IMPROVING FCC PROCESS

HEARING

BEFORE THE

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OF THE

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HOUSE OF REPRESENTATIVES

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IMPROVING FCC PROCESS

THURSDAY, JULY 11, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:35 a.m., in room 2123 of the Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Present: Representatives Walden, Latta, Blackburn, Scalise, Lance, Kinzinger, Long, Ellmers, Barton, Eshoo, Dingell and Waxman (ex officio).

Staff present: Ray Baum, Senior Policy Advisor/Director of Coalitions; Sean Bonyun, Communications Director; Matt Bravo, Professional Staff Member; Andy Duberstein, Deputy Press Secretary; Neil Fried, Chief Counsel, Communications and Technology; Kelsey Guyselman, Counsel, Telecom; Gib Mullan, Chief Counsel, Commerce, Manufacturing and Trade; David Redl, Counsel, Telecom; Charlotte Savercool, Executive Assistant, Legislative Clerk; Phil Barnett, Democratic Staff Director; Roger Sherman, Democratic Chief Counsel; Shawn Chang, Democratic Senior Counsel; Margaret McCarthy, Democrat Staff; Kara van Stralen, Democratic Policy Analyst; and Patrick Donovan, FCC Detailee.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. I will call to order the subcommittee on Communications and Technology and open our hearing on "Improving FCC Process Reform."

The communications industry is one of the few sectors still firing on all cylinders in this economy, averaging $80 billion a year in investment since 1996. It cannot continue to do so, however, if faced with poor FCC process. As Blair Levin, a previous FCC chief of staff and architect of the National Broadband Plan, has lamented, and I quote, "The FCC is becoming more of a political institution and less an expert agency."

Former Chairman Genachowski did make progress in reforming the Commission but there is more to do. The agency has fallen short in the past under both Democratic and Republican administrations. Without codification of certain protections, it will undoubtedly do so again. Only statute can ensure good process from the commission to the next commission. That is why we are discussing two draft bills today designed to minimize the potential for proce-

dural failings, to curb abuse, and to improve agency decision making.

The FCC Process Reform Act passed the House as H.R. 3309 in the last Congress on a 247–174 bipartisan vote. Contrary to the assertions of some, it does not change the public interest test nor strip the FCC's authority to protect consumers and competition. It merely asks the agency to do what we ask of most grade-school students: show your work, to publish the specific language of proposed rules, to identify a market failure or actual consumer harm, and conduct a cost-benefit analysis before regulating; to give commissioners, parties, and the public an adequate opportunity to review proposed rules; to publish the text of decisions promptly and examine whether adopted rules are meeting their purpose; to set "shot clocks" to "give the parties and the public more confidence that the agency is acting with dispatch," as Commissioner Pai put it in his recent statement on the Softbank-Sprint-Clearwire transaction.

Many of these ideas can be found in President Obama's 2011 Executive Order on Improving Regulation and Regulatory Review, which binds executive branch agencies but, unfortunately, not to the FCC. And remember that in my state, public utility commissions already operate under much of what is proposed in this legislation. This is not unusual in America but it is in Washington. The draft bill also requires any transaction conditions to be narrowly tailored to transaction specific harms and otherwise within the FCC's jurisdiction. This was in the bill before Mr. Wheeler was nominated as FCC Chairman, but his blog about the AT&T and T–Mobile merger reinforces the need. In it he notes that the Communications Act does not currently prohibit the FCC from, and I quote, "imposing merger terms and spectrum auction rules that might seem to be regulation in another guise." This is precisely what the transaction review process should not be used for: backdoor rulemaking.

Despite what you may hear, the bill does not dictate the outcome of a transaction review or alter the public-interest standard. The FCC can still find a proposed merger to be inconsistent and against the public interest and it can deny that transaction or adopt tailored conditions to remedy the specific condition.

Now, some opponents argue implementing this bill would be difficult and will lead to litigation. Well, that is not true either. Most of the provisions rely on established definitions and accepted concepts under the Communications Act, the APA, and other law. And rather than micromanage the agency, the bill largely establishes principles and gives the FCC flexibility on how to implement them. I would nonetheless be happy to work with anyone who has a good-faith interest in improving the language as we did leading up to the final version of the bill that passed the House.

Others say it would be unwise to apply these types of reforms except government wide in the context of the Administrative Procedure Act. Well, that would be fine with me, but this committee doesn't have that jurisdiction over the whole APA, and we need to start somewhere in Washington to reform government. Since the FCC oversees a huge and growing part of the economy, it seems a worthy candidate to commence the discussion.

Now, the second draft bill, the FCC Consolidated Reporting Act, passed the House as H.R. 3310 last Congress by voice vote. The legislation looks to relieve burdens on the agency and make its reports more meaningful. It does so by consolidating eight statutorily mandated reports into one biennial review and eliminates 12 outdated studies, like one on the telegraph industry. The existing reports are cumbersome and often unnecessary. A recent Government Accountability Office study on the video competition report, for example, concluded that the reports may not be needed on an annual basis, "especially given demand on FCC staff's time for other monitoring and regulatory duties." The proposed consolidated report will help break down siloed thinking and present a more useful picture of the marketplace upon which to base policy judgments.

Now, I know there are some that have said there is no reason for this committee to spend its time on these efforts, and why would we take up these issues again when the Senate probably won't agree. We are here to reform government. We are here to make changes. We are not here to defend the status quo. And if the United States Senate wants to continue to have the Federal Communications Commission do its telegraph report, well, fine with them, but that is not what we are about. The last thing that we want to do is stifle an industry that is continually growing and innovating. Yet that is exactly what could happen if the FCC is not held to certain standards of decision-making. The industry deserves an efficient and effective regulator we can truly call expert, just as the public deserves a transparent and accountable federal government, and these reforms are a good place to start.

[The prepared statement of Mr. Walden follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

The communications industry is one of the few sectors still firing on all cylinders in this economy—averaging $80 billion a year in investment since 1996. It cannot continue to do so, however, if faced with poor FCC process. As Blair Levin, a previous FCC chief of staff and architect of the National Broadband Plan, has lamented, "[t]he FCC is becoming more of a political institution and less an expert agency."

Former Chairman Genachowski did make progress in reforming the Commission but there is more to do. The agency has fallen short in the past under both Democrat and Republican administrations. Without codification of certain protections, it will undoubtedly do so again. Only statute can ensure good process from commission to commission. That is why we are discussing two draft bills today designed to minimize the potential for procedural failings, curb abuse, and improve agency decision making.

The FCC Process Reform Act passed the House as H.R. 3309 last Congress on a 247–174 bipartisan vote. Contrary to the assertions of some, it does not change the "public interest test" or strip the FCC's authority to protect consumers and competition. It merely asks the agency to do what we ask of most grade-school students-to show its work. To publish the specific language of proposed rules, identify a market failure or actual consumer harm, and conduct a cost-benefit analysis before regulating. To give commissioners, parties, and the public an adequate opportunity to review proposed rules. To publish the text of decisions promptly and examine whether adopted rules are meeting their purpose. To set "shot clocks" to "give the parties and the public more confidence that the agency is acting with dispatch," as Commissioner Pai put it in his recent statement on the Softbank-Sprint-Clearwire transaction. Many of these ideas can be found in President Obama's 2011 Executive Order on "Improving Regulation and Regulatory Review," which binds executive branch agencies but, unfortunately, not to the FCC.

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Some opponents argue implementing this bill would be difficult and will lead to litigation. But it's also not true. Most of the provisions rely on established definitions and accepted concepts under the Communications Act, the APA, and other law. And rather than micromanage the agency the bill largely establishes principles and gives the FCC flexibility on how to implement them. I'd nonetheless be happy to work with anyone who has a "good faith" interest in improving language.

Others say it would be unwise to apply these types of reforms except government wide in the context of the Administrative Procedure Act. That would be fine with me. But this committee does not have jurisdiction over the APA and we need to start somewhere. Since the FCC oversees a huge and growing part of the economy, it seems a worthy candidate to commence the discussion.

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The last thing that we want to do is stifle an industry that is continually growing and innovating. Yet that is exactly what could happen if the FCC is not held to certain standards of decision-making. The industry deserves an efficient and effective regulator we can truly call "expert," just as the public deserves a transparent and accountable federal government. These reforms are a good place to start.

# # #

Mr. WALDEN. With that, I would yield back the balance of my overused time and recognize my friend from California, Ms. Eshoo for an opening statement.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, and good morning to you, and welcome to all of the witnesses. Former Commissioner McDowell, it is always a pleasure to see you and have you with us.

Just 2 weeks ago, Mr. Chairman, we had bipartisan consensus on the need to focus on how federal agencies use spectrum. Today, we are returning to legislation that this subcommittee has debated for 3 straight years. It hasn't nor in my opinion will it go anywhere. Administrative law experts tell us it would tie the FCC up in years of litigation, and I think it really contains some policies that are not good policies. This proposed process reform, in my view, is a back-door way of gutting some of the FCC's very important authorities.

Congress created the FCC to safeguard the public interest. Big corporations, as we know, are well equipped to advance their private interests, and they have every right to do so, but consumers

need advocates and competitors and innovators need a referee to level the playing field.

As we all know, the FCC faces an enormous set of challenges in the coming years including the upcoming voluntary spectrum auction, the transition to IP and the modernization of the e-rate program in our Nation's schools and libraries. Our role as a subcommittee, I think, should be to ensure that the agency is equipped with the tools to meet these challenges while ensuring that the FCC can continue to protect the public interest and preserve competition. I am going to repeat that: preserve competition in the communications marketplace. If we really want to accomplish meaningful reform, I think we should start with a proposal that enjoys nearly universal support including that of the acting chairwoman of the FCC, Commissioners Pai and Rosenworcel, and former FCC Commissioners Abernathy, Copps, and McDowell.

The FCC Collaboration Act of 2013, H.R. 539, is bipartisan, it is bicameral, and it will allow FCC commissioners to more easily collaborate with one another outside of public meetings. As the FCC increasingly responds to complex, highly technical issues, I think now is the time to get this legislation passed and signed into law. We just shouldn't delay anymore. It is really a source of embarrassment. Everyone is for it. We can get it done.

Secondly, I support allowing commissioners to appoint the electrical engineer or computer scientist to their staff that some of them have asked for. This is a bipartisan proposal offered in the last Congress by former Representative Stearns.

Third, I support the creation of an online searchable database of consumer complaints, an idea advanced by the ranking member of the full committee, Mr. Waxman, in the previous Congress, and finally, I agree that there could be opportunities to streamline many of the reporting requirements that Congress has placed on the FCC. We are now in the seventh month of the 113th Congress, but only one bill has moved through our subcommittee. Instead of working on legislation that creates billable hours for Washington telecom lawyers, I think that we need to work together to craft policies that are actually going to move, that will create jobs for innovators, promote investment in infrastructure across our country, and technological advances that will help American families.

So I thank each of our witnesses that are here today. I know that we tried to get some of the opposite sex to show up. I know that they are alive and well out there, but for one reason or another, they couldn't, but I want, if the public is listening in, not to think that we have overlooked that, and again, I want to thank you for working with our subcommittee to help drive competition, promote innovation and protect consumers.

And with that, I will yield back the balance of my time, Mr. Chairman.

Mr. WALDEN. I thank the gentlelady, and I am going to ask for a moment of personal privilege now to acknowledge the service of our committee chief counsel, Neil Fried, who will be leaving the subcommittee soon to work for the Motion Picture Association of America. Neil has rendered outstanding service to this subcommittee for 10 years. He served as subcommittee counsel under full committee Chairmen Townsend, Barton and Upton, and sub-

committee Chairmen Upton, Stearns and myself. He has been part of rewriting the Satellite Home Viewer Act so many times that well, he is going to avoid it this time, I think. Three times he has been there to help rewrite the Home Viewer Act. As a legislative rock star for the committee, his knowledge and expertise will be missed, but I know he will become a legal movie star for the MPAA. Neil, thank you for your service to this committee and to this country. I would have hoped on his final day here we would have him actually at the witness stand so we could have him under oath.

I thank the committee for that indulgence, and now I would recognize the vice chair of the committee, Mr. Latta, for 5 minutes.

OPENING STATEMENT OF HON. ROBERT E. LATTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. LATTA. Well, thank you, Mr. Chairman, and I will not take my 5 minutes, but I want to thank you for holding this hearing on "Improving the FCC Process", and I appreciate our witnesses for being here today. I really appreciate that.

The cost of regulation to American businesses and hence our economy is too great to ignore. Regulatory burden is the number one issue I hear from everyone that I visit in my district, and it is amazing when you have all the different issues out there, the number one issue from everyone, and I have done 250 visits in my district of factories and businesses since the last August work period, it is regulations.

Unfortunately, these job creators, many of them small businesses, are holding back from doing what they do best, and that is driving the economy and actually creating jobs, in part because of the burdensome regulations that are imposed.

I have reintroduced my FCC ABCs Act from last Congress requiring the FCC to perform cost-benefit analysis on economically significant rules, and I appreciate the chairman including this idea in his discussion draft. Additionally, my bill would also reform the Commission's forbearance authority and biennial review of regulations by adding an evidentiary presumption in order to empower the FCC to arrive at more deregulatory decisions.

With the telecommunications industry driving a significant portion of the economic growth in our country, as Members of Congress, we should make sure that the FCC does not produce regulations that will hamper this sector of the economy, and again, Mr. Chairman, I thank you and I yield back the balance of my time.

Mr. WALDEN. The gentleman, I think, wants to actually yield to the gentleman from Texas, Mr. Barton——

Mr. LATTA. I am sorry, and I yield to Mr. Barton.

Mr. WALDEN [continuing]. For such time as he may consume.

Mr. BARTON. I thank the gentleman from Ohio.

I think it is about time that Neil got a real job. We wish him well. Honestly, he is a great guy.

Mr. Chairman, I have introduced FCC reform legislation in the last three Congresses, two Congresses ago, as the ranking member in the minority and last Congress with a subcommittee Chairman Stearns, and of course, I am happy to be on these two bills today.

I seldom disagree very strongly with the ranking minority subcommittee leader, Ms. Eshoo, on too many issues, but I do disagree with her on this. I fail to see how more openness and transparency, which is primarily what these two bills do—I mean, there are other things in the bills—but it is basically an attempt to get more certainty in the rulemaking process and more openness and transparency so that the stakeholders can understand what the commissioner at the FCC are doing. I don't see that as a negative. I see that as a positive.

So as you pointed out in your opening statement, Mr. Chairman, one of these bills passed the House and maybe both of them in the last Congress, so maybe this is the year of the Congress that we actually get it through the Senate and the President signs it. If you look at what has happened at NSA and you look at what is happening with the IRS and you look at what has happened at the Justice Department, I would think those that are interacting with the FCC would want bills like these two because I think they are much better for the American people if we modernize and make more transparent their actions.

With that, I will yield to somebody else or yield back my time.

Mr. WALDEN. I think Ms. Blackburn had requested——

Mr. BARTON. I will yield to the gentlelady from Tennessee.

Mrs. BLACKBURN. Thank you so much, and I want to welcome our panel because we are appreciative that you would take your time and be with us.

And Mr. Chairman, I want to thank you for so diligently pursuing FCC reforms. It is needed. I will tell you, only in Washington, D.C., does it seem to be acceptable for federal agencies to be careless or reckless or unaccountable for taxpayer dollars or to oppose reforms or efficiencies or ways that are going to allow the customers, the end users to be better served. So I do look forward to this.

We have all heard and have grown weary, it seems like there is a scandal and misuse of taxpayer funds every week, whether it is the IRS or Department of Labor or Department of Justice. The list goes on and on—EPA. So putting this issue forward is appropriate, it is timely, and we appreciate that you all would be here to give us your best thoughts and recommendations, and I yield back.

Mr. WALDEN. The gentlelady yields back. All time is expired on our side. We will turn now to the gentleman from California, Mr. Waxman, for an opening statement.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you, Mr. Chairman. I want to begin by also thanking Neil Fried for his service on this committee, and I wish him well in his new position. I hope at the MPAA he will have occasion to visit my district more often and understand the problems of real people.

Mr. WALDEN. You two can travel together.

Mr. WAXMAN. Today the subcommittee revisits a topic that deeply divided our committee last Congress: the so-called FCC process reform. Supporters of this legislation assert that this bill will make

the Federal Communications Commission more transparent and efficient. From our perspective, it is transparent that this legislation is an effort to undermine the agency's ability to adopt new rules, protect consumers, and promote competition, and the only efficiency gained is the speed with which communications lawyers could find new ways to take the FCC to court.

The bill circulated by Chairman Walden earlier this week includes the same defects as the legislation from last Congress. It still undermines the ability of the FCC to act quickly and efficiently by putting in statute a dozen new mandatory process requirements, with each one subjecting the FCC to new court challenges. And it still alters fundamentally the agency's authority to impose conditions during its transaction review process, effectively eviscerating the public-interest standard that has guided the FCC for nearly 80 years.

The red tape created by this legislation is astounding. The Congressional Budget Office estimated that implementing the legislation from last Congress would require 20 additional staff positions at the FCC and cost the agency millions of dollars every year. I don't see that there is an abundance of extra funds to devote to this purpose. And the updated draft is even worse than last year's bill. It contains new provisions that would further incapacitate the agency.

Ranking Member Eshoo and I asked committee staff to consult with administrative and communications law experts to understand the impacts of the legislation. The overwhelming consensus from the independent experts we spoke with was that adoption of this legislation would be a serious mistake that would slow the FCC to a crawl. They told us that the FCC-specific mandates in this bill would remove the Commission from the well-established precedents of the Administrative Procedure Act, which could lead to decades of litigation and breed uncertainty and confusion. The agency would be tied up in knots and unable to do much of anything except report to Congress on its adherence to deadlines.

I am pleased we will be able to hear from two of these experts today: Professor Richard Pierce of the G.W. Law School and Professor Stuart Benjamin from Duke Law School. Professor Pierce is one of the leading authorities on administrative law in the nation. He literally wrote the textbook on this topic. Professor Benjamin brings to us a unique perspective as an expert in both telecommunications law and administrative law who has spent time working at the FCC as a Distinguished Scholar. I also welcome back to the Committee Mr. McDowell, Mr. May, and Mr. Ramsay.

Let me reiterate what I hope is obvious. Democrats are open to improving federal agency operations and efficiency, and the FCC is no exception. We proposed several reforms last Congress and will do so again this Congress. If there are sensible ways to make the agency more efficient and nimble, we should join together to do so. But we seriously disagree about the wisdom of the current effort, and I hope the majority will reconsider its plans to push this through the House. We do far too many message bills that go nowhere in the Senate.

We have a real opportunity to enact meaningful bipartisan legislation that modernizes our communications and technology laws

but every day we spend arguing over this bill, which is going nowhere fast, is another missed opportunity.

Thank you, Mr. Chairman.

Mr. WALDEN. Will the gentleman yield for just a second on the APA issue?

Mr. WAXMAN. Yes.

Mr. WALDEN. Because if you look at the last section of the draft bill, we don't change anything on APA except for the Sunshine Act, that you all support. Just as a matter of clarification, nowhere else in the Act do we change the APA directly. It is only the Sunshine Act.

Mr. WAXMAN. Well, Mr. Chairman, I will be pleased to listen to what the witnesses, who are suggests in this area, have to think about what changes there are in the APA. This would be a serious matter, and I seem to sense that you think it is serious as well.

Mr. WALDEN. I would just direct you to line 5, page 25, section 6, effect on other laws: "Nothing in the Act or the amendment made by this Act shall relieve the FCC from any obligations under Title V, U.S.C. Code, except where otherwise expressly provided," and that is the Sunshine Act.

Mr. WAXMAN. Mr. Chairman, reclaiming my time, as I understand it, it removes the Administrative Procedure Act from the FCC and creates another set of laws under which it would operate that is similar to the Administrative Procedures Act but is different, and I want to get that point clarified in this hearing. I think this is why we have hearings.

Mr. WALDEN. That is exactly why we have hearings, and even for bills that go forward.

Let me suggest that we have 11 minutes left in the vote, so rather than start with one person's testimony, I would recommend that we recess the committee now until after votes. So I know you are all poised and ready to go, and we appreciate it, but I think it is probably best for the flow of the testimony that we recess until we return from votes immediately. Thank you.

[Recess.]

Mr. WALDEN. If we could have everybody take their seats, we are going to restart the hearing and hear from our witnesses. I apologize for the delay, and they do expect votes again right around noon, so hopefully we can at least get through the statements of our distinguished panel members, and we will start off with Mr. Downes, who is an Internet industry analyst and author, and we welcome you to the Subcommittee on Communications and Technology, and go ahead and turn that mic on, pull it up close, and we look forward to your testimony on this matter. Thank you, sir.

STATEMENTS OF LARRY DOWNES, INTERNET INDUSTRY ANALYST AND AUTHOR; RICHARD J. PIERCE, JR., LYLE T. ALVERSON PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL; RANDOLPH J. MAY, PRESIDENT, FREE STATE FOUNDATION; JAMES BRADFORD RAMSAY, GENERAL COUNSEL, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS; STUART M. BENJAMIN, DOUGLAS B. MAGGS CHAIR IN LAW AND ASSOCIATE DEAN FOR RESEARCH, DUKE UNIVERSITY SCHOOL OF LAW; AND ROBERT M. MCDOWELL, FORMER FCC COMMISSIONER AND VISITING FELLOW, HUDSON INSTITUTE

STATEMENT OF LARRY DOWNES

Mr. DOWNES. Well, thank you, Mr. Chairman and Ranking Member Eshoo and members of the subcommittee. I appreciate the opportunity to testify today on the importance of reforming processes at the FCC. My name is Larry Downes. I am based in Silicon Valley. I am an Internet industry analyst and the author of several books on the information economy, innovation and the impact of regulation. I have also written extensively on the impact of communication policy on the dynamic broadband ecosystem and in particular the role played by the FCC.

As the nature technological innovation has both accelerated and mutated in the last decade in particular, the FCC's inability to eliminate needless roadblocks for consumers, entrepreneurs and incumbents alike has reached a breaking point. The agency continues to tinker with a 21st century communications ecosystem using a 19th century toolkit. Many of the FCC's processes are badly in need of reform and structure. They lack economic rigor, transparency, expediency and consistency.

As Nobel Prize-winning Ronald Coase famously wrote, "If you torture the data long enough, nature will always confess." That, in a nutshell, has become the FCC's unintended modus operandi. The agency collects the data it needs to make wise and efficient decisions, but in the absence of clear guidelines and the most basic economic tools, the Commission cannot resist the urge to abandon the logical conclusions compelled by their own data in the service of vague, idiosyncratic, transient and, often, unarticulated policy goals.

These problems devalue much of the good work of the agency's staff and subvert the often admirable goals of the FCC's Chairmen and Commissioners. They have created an epidemic of side effects, including reports that fail to reach obvious conclusions supported by the thorough data collection the staff performs, limiting their usefulness as policy tools to advance the FCC's longstanding charter to promote communications to all Americans; rulemakings that torture their analysis and data to justify what appear at least to be ex ante conclusions to regulate regardless of the need or cost; painfully slow reviews of license transfers aimed at avoiding an imminent spectrum crisis which when approved are rendered incoherent by laundry lists of unrelated conditions, many of which become counterproductive or mooted by technological advances years before they expire. In approving the Comcast-NBC University merger, for example, which took the FCC nearly a year, the agency imposed 30

pages of conditions including a requirement to run certain commercials on certain channels at certain times for a period of 5 years; and finally, past and now future spectrum auctions poisoned by similar interventions weighed down with so many strings attached, they either fail to achieve minimum bids or leave billions of dollars on the table.

Given rapid changes in the broadband ecosystem, the FCC needs some measure of flexibility to complete its statutory mission. But applying that flexibility ungrounded by neutral principles, guidelines and analytic processes invariably does more harm than good. Worse, the lack of structure has left the FCC with the mistaken impression that the agency can predict an increasingly unpredictable future and design what it calls prophylactic remedies for consumer harms that have yet to occur.

In effect, the Commission's decision-making process is at war with the agency's own data. Congress can easily ameliorate the worst symptoms of this breakdown. The two discussion draft bills before you provide many commonsense, modest, apolitical repairs imposing needed structure on the FCC's processes.

As those of us in the technology industry have learned the hard way, the pace of change has long since outrun our ability to predict the future even in the short term. The FCC must be cured of its addiction to micromanaging markets that are evolving even as the Commission's deliberations meander along, and it must focus its remedial and regulatory efforts on relevant consumer harms that are tangible and solvable with both precision and measurable efficacy. That minimal level of regulatory process has been mandatory for executive agencies since President Clinton ordered it in 1993, an order amplified by President Obama in 2011. President Obama also made clear he expected though he could not require the same basic tools be applied as a matter of course by independent regulatory agencies including the FCC. Indeed, most independent regulatory agencies, according to a recent longitudinal survey by the Administrative Conference of the United States are already required by law to conduct some level of cost-benefit analysis. The FCC is one of the very few who do not have such mandates in their implementing statutes, and perhaps the only agency that doesn't do it anyway.

There is also nothing novel or difficult about the added requirement the FCC consider as an alternative to specific interventions the possibility that high-tech markets will cure their own ills more quickly and efficiently and with fewer unintended side effects. That was, for example, precisely the approach taken by the Department of Justice in its separate review of the Sirius-XM satellite radio merger. In a 4-page statement closing its review, the Antitrust Division sensibly found that new forms of competition driven by emerging Internet technologies would be more than adequate to discipline the combined entity, and they have been proven abundantly correct. By contrast, it took the FCC 17 months and a 100-plus-page order laden with conditions to reach the same conclusion.

Thank you for the invitation to appear today. I look forward to your questions.

[The prepared statement of Mr. Downes follows:]

Hearing on "Improving FCC Process"

Before the Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives

Written Testimony of Larry Downes[1]
Internet Industry Analyst and Author

July 11, 2013

Chairman Walden, Ranking Member Eshoo and members of the Subcommittee, thank you for this opportunity to testify on the importance of reforming processes at the FCC.

My name is Larry Downes. Based in Silicon Valley, I am an Internet industry analyst and the author of several books on the information economy, innovation, and the impact of regulation. I have also written extensively on the effect of communications regulation on the dynamic broadband ecosystem, and in particular the role played by the FCC. I include several of my prior publications in an Appendix.

Summary

As the nature of technological innovation has both accelerated and mutated in the last decade,[2] the FCC's inability to eliminate needless roadblocks for entrepreneurs and incumbents alike has reached a breaking point. The agency continues to tinker with 21st century problems using a 19th century toolkit. Many of the agency's processes are badly in need of reform and structure. They lack economic rigor, transparency, expediency or consistency.

As Ronald Coase famously wrote, "If you torture the data long enough, nature will always confess."[3]

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[1] Larry Downes is an Internet industry analyst and author. His books include *Unleashing the Killer App* (Harvard Business School Press, 1998), *The Laws of Disruption* (Basic Books, 2009) and *Big Bang Disruption: Strategy in an Age of Devastating Innovation* (Penguin Portfolio, forthcoming 2013).

[2] *See* Larry Downes and Paul F. Nunes, *Big Bang Disruption*, Harvard Business Review 44 (March, 2013); *A New Kind of Disruption*, HARVARD BUSINESS REVIEW 20 (May, 2013).

[3] Ronald H. Coase, *How Should Economists Choose?* in ESSAYS ON ECONOMICS AND ECONOMISTS 27 (University of Chicago Press 1994).

That, in a nutshell, has become the FCC's unintended *modus operandi*. The agency collects the data it needs to make wise and efficient decisions, but in the absence of clear guidelines and the most basic economic analysis, the Commission cannot resist the temptation to abandon the logical conclusions compelled by that data in the service of vague, idiosyncratic, transient and, often, unarticulated policy goals.

The lack of structure wastes both government and private resources. Worse, it vastly underemphasizes the likelihood that imminent technology disruptors will better and more efficiently advance the communications needs of American consumers with far fewer unintended consequences.

These problems devalue much of the good work of the agency's staff and subvert the often admirable goals of the FCC's Chairmen and Commissioners. They have created an epidemic of negative side-effects, including:

- Many of the agency's reports fail to reach obvious conclusions supported by the thorough data collection the agency performs, limiting their usefulness as policy tools to advance the FCC's longstanding charter to promote communications to all Americans.

- Rulemakings torture their analysis and data to justify what appear to be *ex ante* conclusions to regulate — regardless of the need or cost.

- The value to consumers of license transfers aimed at avoiding an imminent spectrum crisis are dissipated by the unchecked growth of laundry lists of unrelated conditions, many of which become counter-productive or mooted by technological advances years before they expire.

- Recent spectrum auctions have been poisoned by similar policy interventions. The 2008 700 MHz auctions were so weighed down with conditions that the most important auctions failed. The "C" Block auction left billions of dollars on the table. The "D" Block didn't even meet its minimum bid.[4]

[4] Larry Downes, *A Strategic Plan for the FCC: The Future Ain't What it Used to Be*. FORBES (DEC. 5, 2011), http://www.forbes.com/sites/larrydownes/2011/12/05/a-strategic-plan-for-the-fcc-the-future-aint-what-it-used-to-be-2/; *see also* Gerald R. Faulhaber & David J. Farber, *The Open Internet: A Customer-Centric Framework*, 4 INTERNATIONAL JOURNAL OF COMMUNICATION 302 (2010), *available at* http://ijoc.org/index.php/ijoc/article/viewFile/727/411.

In the absence of formal guidelines and processes to complete these core activities, the FCC enjoys considerable flexibility to deal with a fast-changing market. But that informality leaves the agency with no useful mechanism for determining whether any particular intervention will serve consumers more efficiently than simply allowing technological evolution to take its natural course.

Worse, the lack of structure has left the FCC with the mistaken impression that the agency can predict an increasingly unpredictable future, and design what it calls "prophylactic" remedies for consumer harms that have yet to occur.

In effect, the Commission's decision-making process is at war with the agency's own data.

Given rapid changes in the broadband ecosystem, the FCC, of course, needs some measure of flexibility to complete its statutory mission. But applying that flexibility ungrounded by neutral principles, guidelines, and analytic processes invariably does more harm than good.

As markets have become more dynamic thanks to the accelerating introduction of disruptive computing and communications technologies, the FCC has simply dug in its heels, basing its decisions on a strangely siloed view of the industries it oversees. This unstructured approach becomes more dangerous and more anachronistic every day. When push comes to shove--as it always does--the FCC has demonstrated a dangerous and growing tendency to ignore its own data and go with its gut, or worse.

The dynamic nature of the markets and industries the agency oversees requires a 21st century FCC. The agency urgently needs neutral, streamlined, and balanced decision-making processes. With them, the agency could become a genuine partner, accelerating adoption of new technologies and the economic growth that goes with them. Without them, the agency will increasingly stand as an obstacle to achieving the broadband ecosystem's full potential to improve the lives of all Americans.

The foundations for a more productive role for the FCC—a role consistent with the agency's long-stated statutory purposes--are already in place. In preparation for the many reports the agency is required to produce, agency staff have become adept at collecting and reporting vast troves of useful information regarding market conditions, consumer behavior, and competition.

These reports describe an increasingly complex communications ecosystem in which all manner of content is now being delivered on converged IP networks, and in which market discipline

comes not just from direct competitors but from every participant in the ecosystem—including device makers, software developers, service providers, and consumers themselves.

Yet in *applying* that data, whether in reports, rulemakings, amendments, orders, auction designs or transaction reviews, the agency has no process, or at least none based on the uncontroversial principles of basic cost-benefit analysis. With nothing more than the undefined "public interest" lens through which to squeeze this mountain of data, the agency's processes have become unstructured, ranging dangerously far from both statutory and Constitutional limits.

Congress can easily ameliorate the worst symptoms of this breakdown. The two discussion draft bills before you, Federal Communications Commission Process Reform Act of 2013 (HR 3309 in the 112th Congress) and Federal Communications Commission Consolidated Reporting Act of 2013 (HR 3310 in the 112th Congress),[5] provide many common-sense, modest, apolitical repairs, imposing needed structure on the Commission's processes.

This testimony briefly highlights the negative unintended consequences that unstructured reviews are causing, particularly in the broadband ecosystem. I also offer suggestions for additional process controls that are acutely needed as the FCC's role in rapidly evolving technology markets becomes more determinative.

In short, as those of us in the technology industries have learned the hard way, the pace of change has long-since outrun our ability to predict the future, even in the short-term. The FCC must be cured of its counter-productive habit of micromanaging markets that are evolving even as the Commission deliberates. It must weigh the costs of intervention against the likelihood that even demonstrable market failures are increasingly resolved by the imminent next generation of technology, often deployed by enterprises, entrepreneurs and competitors that didn't exist when the agency began its review. And it must focus its remedial and regulatory efforts on relevant consumer harms that are tangible and solvable with both precision and measurable efficacy.

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[5] Discussion Draft, *Federal Communications Commission Process Reform Act of 2013*, http://docs.house.gov/meetings/IF/IF16/20130711/101107/BILLS-113pih-FCCProcessReformAct.pdf (July 11, 2013); Discussion Draft, *Federal Communications Commission Consolidated Reporting Act of 2013*, http://docs.house.gov/meetings/IF/IF16/20130711/101107/BILLS-113pih-FCCConsolidatedReportingAct.pdf (July 11, 2013).

Transaction Review

The FCC's process failures are most painfully visible in the agency's transaction review process--in precisely the area where grounded approaches are most urgently needed. Here, the Commission's inability to keep pace with changing technological and competitive dynamics has created a long list of negative unintended consequences, including:

- Long delays in processing applications for license transfers that accompany mergers, acquisitions, and other financial transactions, even as technological disruption accelerates and consumer demand for services explode. Transfers delayed are consumers unserved.
- Needlessly burdensome conditions and "voluntary" commitments that stifle competition rather than preserving it, many unrelated to the actual transaction.
- Inconsistent restrictions applied at different times to different licensees in the same industry that reduce transparency and increase consumer confusion.
- Long periods of expensive and distracting post-transaction reporting, monitoring, and enforcement by the FCC, with no mechanism to determine if technology and market changes have eliminated the need for some conditions, or rendered them counter-productive.
- Duplicative review, using different standards and different burdens of proof, with merger reviews conducted on related transactions by the Department of Justice.[6]

There is an acute need for process reform in the agency's review of license transfers. As someone who works not in Washington but in Silicon Valley, I speak daily with entrepreneurs, innovators, and venture investors. We are now spending more and more of our time dealing with what the FCC accurately termed in 2009 the "spectrum crisis,"[7] which threatens to slow or even stall the remarkable engine of innovation that is the broadband ecosystem. Already, that crisis has foreclosed valuable innovations and services that could instead be serving the insatiable demands of mobile customers.

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[6] In the Verizon-SpectrumCo transaction, the FCC attached competition-related conditions to joint marketing and other commercial agreements that were part of the overall deal but which did not include the transfer of licenses. Whether ancillary or unrelated agreements have anticompetitive effect, however, is appropriately the province of the Department of Justice. Their effect on competition is best measured under the antitrust laws, not the "public interest" standard. If the FCC continues to assert jurisdiction over such agreements as part of its public interest review, its evaluation of license transfers will quickly transform into unfettered authority to regulate any aspect of the merged entity's business. This not only duplicates DOJ review, it also does so under a standard that lacks any clear limiting principles or analytical rigor.

[7] Prepared Remarks of Chairman Julius Genachowski of the Federal Communications Commission, *America's Mobile Broadband Future*, International CTIA WIRELESS I.T. & Entertainment in San Diego, CA (Oct. 7, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293891A1.pdf.

Consumers across the world have embraced inventions in mobile computing, most of which continue to originate in the U.S., faster and more enthusiastically than any previous technological innovation we've created. The broadband ecosystem has provided what has sometimes been the lone bright spot on our struggling economy.

But as the National Broadband Plan (NBP) acutely recognized, U.S. consumers, especially in urban areas, are so eager to embrace the latest mobile devices, services, apps and content that they are challenging the natural limits of existing networks to continue to satisfy demand.

Since 2009, remarkably, smartphone adoption has jumped from 30% to 67%.[8] Network traffic has continued to more than double year over year since 2007.[9] Overall, wireless innovation supports nearly 3.8 million American jobs today and contributes nearly $200 billion to the economy.[10] These are just a few of the metrics reported by the FCC; job creation, economic value, U.S. competitiveness, and other measurements have similarly risen.

To support this unparalleled growth, the NBP conservatively estimated that mobile network operators would require an additional 300 MHz of dedicated spectrum by 2015 and 500 MHz by 2020.[11] But for the first time in our history, there is almost no available inventory of usable and unassigned frequencies. The spectrum frontier is now effectively closed.[12]

To their credit, Congress, the FCC, and the White House have worked hard to keep the broadband economy booming. This Subcommittee, on a bi-partisan basis, has done much to support that effort, including introducing legislation authorizing the FCC to conduct Voluntary Incentive Auctions (VIA) (which became part of the Middle Class Tax Relief Act),[13] and

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[8] Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Sixteenth Report ¶ 349 (Mar. 21, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-34A1.pdf (hereinafter 16th Annual Mobile Competition Report).

[9] *Id.* at 12.

[10] Roger Entner, *Entner: Managing Market Share By Restricting Spectrum Ownership – Warnings of a Managed Economy?* Fierce Wireless (June 8, 2013), http://www.fiercewireless.com/story/entner-managing-market-share-restricting-spectrum-ownership-warnings-manage/2013-06-08.

[11] National Broadband Plan, *Goals and Action Items*, Broadband.gov, p. 26 (last visited July 9, 2013), *available at* http://www.broadband.gov/plan/goals-action-items.html.

[12] Larry Downes, *Averting a Spectrum Disaster: Now for the Hard Part*, CNET (Feb. 25, 2012), http://news.cnet.com/8301-1035_3-57385202-94/averting-a-spectrum-disaster-now-for-the-hard-part/.

[13] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 (codified at 47 U.S.C. § 1422 (2012))

requesting monthly status updates from federal agencies on their efforts to free up spectrum for consumer services.[14]

Congress has rightly determined that over-the-air broadcasters and federal government assignees are the most promising sources for unlocking unused and underutilized frequencies that would achieve better and higher use by broadband consumers.

So far, unfortunately, we have little to show for this hard work.

The Voluntary Incentive Auctions have not kept up with the schedule originally proposed by the FCC. And even if VIA design and execution had not become bogged down, it would, realistically, have taken at least a decade to bring new spectrum online—well past the NBP's doomsday clock for the spectrum crisis. And despite now two strongly-worded Memoranda from the White House, federal uses, notably the Department of Defense,[15] have been slow to acknowledge the President's insistence that the federal government cooperate in the FCC's efforts to provide up to 500 MHz by 2020.[16]

As a result of delays and roadblocks, network operators are working overtime to squeeze out additional value from current spectrum licenses by improving the efficiency of existing networks. They are deploying new technologies, including fiber backhaul, smaller cells and smart antennas.[17] And they are doing what they can to get existing customers to migrate to more spectrum-efficient protocols, notably 4G LTE. (The U.S. already leads the world in LTE adoption, with over half of the world's total LTE connections.[18])

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[14] *See* Gary Arlen, *House Commerce Committee Wants Monthly Updates From Federal Agencies on Spectrum Realignment*, BROADCASTING & CABLE (June 28, 2013), http://www.broadcastingcable.com/article/494285-House_Commerce_Committee_Wants_Monthly_Updates_From_Federal_Agencies_on_Spectrum_Realignment.php.

[15] *See* Presidential Memorandum: Unleashing the Wireless Broadband Revolution (June 28, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution; *see also* Presidential Memorandum: Expanding America's Leadership in Wireless Innovation (June 14, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/14/presidential-memorandum-expanding-americas-leadership-wireless-innovatio.

[16] National Broadband Plan, *see supra* note 11.

[17] Their ability to do so, however, is limited by the slow pace of local approval for all manner of infrastructure improvement, including replacing existing equipment, adding new equipment to existing cell towers and utility poles, and construction of new towers. *See* Larry Downes, *Does Your iPhone Service Suck? Blame City Hall*, CNET (Sept. 8, 2011), http://news.cnet.com/8301-1035_3-20102911-94/does-your-iphone-service-suck-blame-city-hall/.

[18] Jonathan Spalter, *Spectrum for Brighter Mobile Future*, MOBILE FUTURE (June 26, 2013), http://mobilefuture.org/spectrum-for-brighter-mobile-future/.

The most effective tool for deferring the spectrum crisis so far, however, has been to make innovative use of secondary spectrum markets. These markets allow willing parties to transfer spectrum already licensed for mobile applications among themselves.

As the FCC reports, licensees have completed over a dozen major spectrum transfer transactions since 2007. Secondary markets have enabled license holders such as SpectrumCo to dispose of valuable spectrum that had long sat idle. In other cases, carriers have used the secondary markets to divest licenses in frequencies that are more complementary to the networks of others, and to acquire spectrum that better fits their own portfolio.

In every example, these market transactions have served the policy goal of putting limited spectrum capacity to better and higher uses.

The secondary markets, however, are severely constrained by outdated FCC transfer procedures and policies. And license transfers, by law, are subject to FCC approval.[19] According to the Communications Act, license transfers freely negotiated will nonetheless be rejected unless the FCC makes a finding that the transfer is in "the public interest."

But the public interest standard has never been defined, nor has Congress imposed any rigor on the how the agency applies it. As a result, over the last several years, the agency has demonstrated a disturbing willingness to use its gatekeeping role to advance a wide variety of conflicting and unrelated policy agendas.

With little to guide or constrain such reviews, the FCC's application of the public interest standard has become increasingly unstructured. In the last few years, for example, the agency has shown a dangerous tendency toward "mission creep," using license transfer proceedings to advance unrelated and often eccentric policy agendas or otherwise evade restrictions on agency jurisdiction imposed by Congress. Worse, the agency's often-lengthy transaction-related orders are rendered incoherent by a growing opaqueness in the methods, analysis, and processes used in transaction reviews. Such reviews increasingly appear cobbled together after the fact to support ex ante decisions based on unstated policy goals.[20]

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[19] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending 47 U.S.C. § 310(d) (2012)).

[20] Larry Downes & Geoffery A. Manne, *The FCC's Unstructured Role in Transaction Reviews*, 1 CPI ANTITRUST CHRONICLE 1 (2012); *See also* Larry Downes, *The FCC Scores a Hat Trick of Errors on Internet Regulation*, FORBES (Aug. 27, 2012), http://www.forbes.com/sites/larrydownes/2012/08/27/the-fcc-scores-a-hat-trick-of-errors-on-internet-regulation/.

The FCC's unstructured role has become a bottleneck that threatens the health and dynamism of the broadband ecosystem--the exact opposite of the part the agency should and intends to play. Transfers delayed are consumers unserved. "Prophylactic" conditions intended to remedy potential competitive harms become millstones on the necks of licensees, leaving them unable to respond quickly to rapidly-changing technological and market conditions. Inconsistent rulemakings in the guise of transaction conditions lead to consumer confusion and less, not more, transparency into FCC decision-making.

As the scope of transaction reviews inexplicably expands, for example, reviews take longer, involve messier public records and agency inquiries, and attract more self-serving intervention from competitors and lobbyists. The FCC's review of Sirius's acquisition of XM Radio took seventeen months to complete. Comcast-NBC Universal was approved after ten months, while AT&T/T-Mobile was rejected after seven months. The Verizon-SpectrumCo deal went through, with significant conditions, in eight months.[21]

Transactions that are approved now come with comically-long lists of conditions, including divestitures of some customers or spectrum aimed vaguely at preserving competitive equilibrium even as the market shifts before the ink is even dry on license transfer orders.[22]

The result has been a free-ranging and increasingly drawn-out process, where the agency sometimes imposes over a hundred conditions, some imposed directly and others taking the form of "voluntary" commitments from the parties. These conditions are often imposed for periods much longer than the agency could reasonably anticipate potential consumer harms--for seven years or even longer.

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[21] *See* Memorandum Opinion and Order and Report and Order, *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee*, FCC 08-178, MB Docket No. 07-57 ¶¶ 20-22 (Aug. 5, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-178A1.pdf; Memorandum Opinion and Order, *In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, FCC 11-4, MB Docket No. 10-56 ¶ 20 (Jan. 20, 2011), *available at* http://transition.fcc.gov/FCC-11-4.pdf; Order, *In re Applications of AT&T Inc. and Deutsche Telkom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, DA 11-711, WT Docket No. 11-65 ¶¶ 1-2 (Nov. 29, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-711A1.pdf; Memorandum Opinion and Order, *In re Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent to Assign AWS-1 Licenses, Applications of Verizon Wireless and Leap for Consent to Exchange Lower 700 MHz, AWS-1, and PCS Licenses, Applications of T-Mobile License LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign Licenses*, FCC 12-95, WT Docket Nos. 12-4, 12-175 ¶¶ 20, 26 (Aug. 23, 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-95A1.pdf.

[22] The merger of T-Mobile and MetroPCS, for example, and the imminent acquisition of Sprint by Softbank undermine many of the assumptions built into the FCC's analysis of recent license transfers, reports, and rulemakings.

Worse, many of the conditions, as well as voluntary commitments imposed on the parties, are wildly unrelated to the transaction or even to a permissible policy objective. For Comcast-NBC Universal, the conditions ran to nearly thirty pages, including a requirement that Comcast adhere to a sui generis version of net neutrality regulations that conflicts with the agency's subsequent rulemaking; rate regulation on Comcast's broadband service; and specific requirements on which channels Comcast offers in its cable packages. Some even defined specific commercials the company would need to run, and on which channels.[23]

In effect, the agency now uses transaction reviews to impose the kinds of regulations that would otherwise require a formal rulemaking, and then compounds that error by applying specific versions of such rules just to the parties involved in a particular license transfer. In many cases, these conditions unfairly manipulate the competitive landscape, applying unrelated restrictions on some parties simply because they happen to be in need of FCC permission to complete a license transfer. Often, the conditions impose rules the agency would be prohibited from enacting through the formal process, either because they exceed the agency's statutory authority or because they run afoul of clearly-established Constitutional constraints.

Besides veering wildly outside the substantive limits on the agency's jurisdiction delegated by Congress, this regulation-by-license-condition process also dispenses with formal procedural requirements, notably notice-and-comment. And because they take the form of orders negotiated by the affected parties, these pseudo-rulemakings, while enforceable by the Commission, are effectively unreviewable by courts.

The net result is a regulatory crazy quilt, where different rules apply to different companies at different times, often in different local markets. The complexity needlessly impedes subsequent transactions, effectively compounding the harm of unstructured reviews in future

[23] "C-NBCU shall provide public service announcements ("PSAs") with a value of $15 million each year on digital literacy, parental controls, FDA nutritional guidelines and childhood obesity. The PSAs on digital literacy, parental controls and FDA nutritional guidelines shall run on networks or programming that have a higher concentration than the median cable network (viewers-per-viewing-household) of adults 25-54 with children under 18 in the household. For the PSAs on childhood obesity, C-NBCU shall air one PSA during each hour of NBC's 'core' educational and informational programming, as defined by 47 C.F.R. § 73.671, on the broadcast stations' primary channels, and an average of two PSAs per day shall run on PBS KIDS Sprout. This Condition shall remain in place for five years." Memorandum Opinion and Order and Report and Order, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, FCC 11-4, MB Docket No. 10-56, p. 139 § XIII(6) (Jan. 20, 2011) *available at http://transition.fcc.gov/FCC-11-4.pdf*.

reviews. Consumers, at the same time, can't be expected to understand why different rules apply to different products and services. The lack of effective process is chilling the investment climate for companies throughout the broadband ecosystem, in direct contradiction to Congress's clear intent.

HHIs and the Spectrum Screen: Masking a Lack of Process

Regulation-by-license-condition imposes far more harms on consumers than the often theoretical issues such conditions purport to remedy. The FCC can do much better. And it must. Just as the closing of the real frontier in 1890 required reform of land use and transfer policies, so too does the spectrum crunch require new approaches to transaction review and approval.

As a starting point, the FCC should be required to formalize its review process. This includes applying consistent, transaction-neutral cost-benefit analysis to both the review of a proposed transaction's impact on consumers and of any remedies being considered to offset cognizable harms. The FCC should take into consideration its own data on market dynamics, and weigh heavily the very likely potential that technology-driven forms of competition will more effectively and efficiently resolve the kinds of problems the long lists of unrelated conditions seem intended to forestall.

Under the FCC's current unstructured "public interest" review, the agency has backed itself into a crabbed and dismal view of the mobile marketplace, more 19th century than 21st century. It reviews each transaction as if mobile technologies were stagnant, demand were flat, and the only competitive pressure on licensees comes from other "national carriers." The FCC gives no consideration to the vital role played by nearly a dozen distinct forms of technology-driven market discipline (described below) that the agency dutifully catalogs and tracks in its reports.

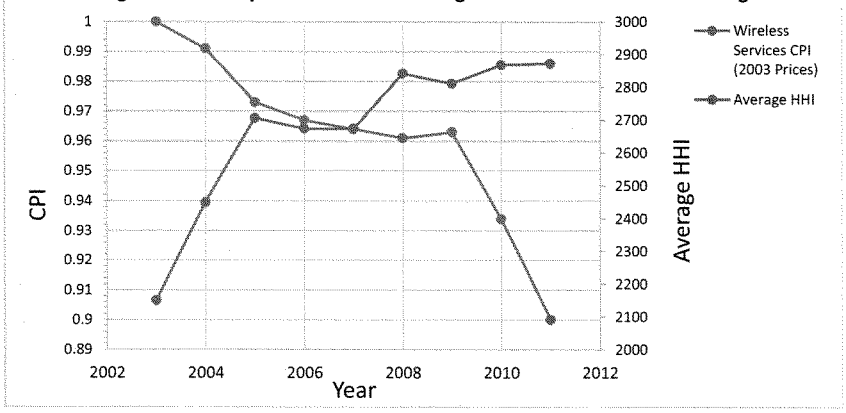
Today, the absence of basic technological or economic rigor in transaction reviews is masked by page after page of detailed data analysis that is then ignored. The FCC then obscures this failure with the misapplication of obsolete and inapplicable pseudo-measures of market concentration, notably the Herfindahl-Hirschman Index (HHI) and the so-called "spectrum screen."

The HHI, a 1940's era calculation that estimates the level of concentration in a given industry, mechanistically sums the squares of market share for each direct competitor in whatever the agency decides is a relevant local market. The FCC then assumes without evidence that arbitrary numerical ranges predict "concentrated" or "highly concentrated" conditions that would result from a merger.

The agency next takes a dangerous leap of faith, assuming that such concentration is likely to lead to anti-competitive behavior the market would not correct on its own, and that such behavior would result in higher prices and other consumer harms.

Yet measured simply by HHIs, the overall mobile industry has been "highly concentrated" since 2005, at levels the FCC has recently said, without any evidence, trigger a "presumption" of "harm to competition."

Figure 1: Industry Concentration is Rising While Cellular Prices are Falling



Source: HHI from 16th Wireless Report Table 14; Wireless CPI from 16th Wireless Report Table 37.
Notes: Population-weighted average HHI of 172 Economic Areas as computed by the Commission. Cellular CPI is denominated in 2003 prices.

As every consumer knows, the untortured data tell a very different story. Despite those levels of concentration, prices for voice, text, and data have continued to plummet. (See Figure 1)[24]

The HHI calculation, in any event, is of no value. As the FCC explains in all of its reports, competition in the mobile ecosystem is much more complex and sophisticated than simplistic market concentration might infer, affected in critical ways by a wide range of factors beyond

[24] *See also* Gerald R. Faulhaber, Rober W. Hahn & Hal J. Singer, *Assessing Competition in U.S. Wireless Markets: Review of the FCC's Competition Reports* (July 11, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880964.

the customer base or spectrum holdings of direct competitors. According to the FCC's most recent Mobile Competition reports,[25] for example, these include:

1. **Regional and local competitors** – Despite the FCC's focus on national market share, most consumers choose their carrier based on local alternatives; they don't buy based on the strength of nationwide coverage. At the local level, 90% of U.S. consumers can choose from five or more carriers for voice; 80% have three or more choices for mobile broadband.

2. **Device manufacturers** – The availability of particular tablets and smartphones on a network plays a significant role in which carrier a consumer chooses. From 2008-2009, for example, 38 percent of those who switched carriers did so because it was the only way to obtain the particular handset that they wanted. If anyone has market power, it is the device manufacturers—and that power rises and falls with each new model and the changing market share of different operating systems and app stores.

3. **Operating system developers** – Consumer decision-making is also highly influenced by the availability of a particular operating system (iOS, Android). Android captured 20% of the mobile O/S market in the first six months, giving Google considerable leverage in the market overall.

4. **Apps** – Consumers also make choices based on the availability of preferred apps, including music, video, geolocation, and social networking services. The most popular activity by far for today's smartphone users is games, some of which are only available on some devices or operating systems.

5. **Enhanced spectrum** – Technology has continued to make more bands of spectrum usable for more types of communications. Clearwire now offers mobile broadband using spectrum in the >1 GHz range; Dish Networks has proposed the use of satellite spectrum to offer 4G service. And the LTE protocol is dramatically more efficient in its use of spectrum than earlier generations.

6. **Available spectrum and cell tower infrastructure** – Carriers continue to invest billions every year in enhanced infrastructure. But the quality of service network operators can

[25] *See* 16th Annual Mobile Competition Report, *supra* note 7. *See also* Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report (June 27, 2012), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-103A1.pdf.

provide is still highly constrained by the lack of available spectrum. At the local level, delays and even corruption in approving applications to add towers or antennas makes it difficult for network operators to make the best use of the limited spectrum they have. At the end of 2009, over 3,000 applications to add or modify cell towers and antennae had been pending for over a year; many for over three years.

7. **Off-the-charts demand for capacity** – Carriers are also pressured by incredible increases in demand for mobile broadband. Since the introduction of the iPhone in 2007, AT&T reported an increase of over 8,000% in data traffic.

8. **No-contract carriers** – As capacity constraints push contract carriers to curtail unlimited data plans, competition from no-contract or "pre-paid" providers has intensified. The distinction between pre- and post-paid networks is increasingly meaningless, yet the FCC gives little to no weight to the discipline such providers exert in reviewing transactions...

9. **Inter-modal competition with wired networks** – By 2010, 25% of all U.S. households relied exclusively on mobile connections for home voice service ("cutting the cord."). As high-speed, high-capacity LTE networks (and whatever comes after LTE) are deployed, mobile carriers will increasingly compete with wired carriers for the same customers, including traditional phone and cable companies. The pool of competitors is expanding, not contracting.

Thanks to these varied forms of market discipline, even a mobile ecosystem that is "highly concentrated," at least as measured by HHIs, doesn't seem to have harmed consumers. To the contrary. As every measure of market performance collected by the FCC makes clear, the broadband ecosystem is providing consumers with a phenomenal range of new products and services, at the most competitive prices of any industry.

That's because there are plenty of other sources of competition in the market beyond direct competitors, sources well documented by the FCC itself. Put more simply, concentration measured by HHI concentration has become a worthless tool in evaluating mobile competition.

Backing up the HHI analysis is the voodoo of the spectrum screen, a remarkably elastic and utterly unscientific tool that purports to test the competitive impact in local markets of proposed license transfers.

The spectrum screen was introduced to simplify the review of license transfers,[26] but in recent reviews it has morphed into a presumption of harm in markets where the screen is exceeded.

In either case, the spectrum screen is a poor proxy for several reasons. It includes only some frequencies licensed for mobile services and leaves out others more or less randomly, often modifying that list in different markets — as if radio technology worked differently in California than it does in Virginia.

Worse, the screen treats all the included frequencies as if each band, whether above or below 1 GHz, whether complementary or not to the parties existing holdings or those of its competitors, were of identical value to each network operator. The FCC's own data collection amply reveals the technical and economic fallacy of such a gross simplification.

The screen is also modified from transaction to transaction on an *ad hoc* basis, based on no established or even articulated criteria, leaving the strong impression that the adjustments are made simply to get the numbers to come out the way a majority of the Commissioners wants them to come out, for reasons that can only be guessed. Even the appearance of post hoc rationalization undermines the integrity of the FCC's transaction reviews.

The spectrum screen's failings as an analytic tool are legion. Since its invention, it has never been the subject of any formalization subject to notice-and-comment; the screen simply lumbers, like Frankenstein's monster, from one transaction review to the next. To its credit, the FCC recently issued a Notice of Proposed Rulemaking aimed at making some sense of it, or perhaps to put it to a much-needed demise.[27] But the Commission's true intentions are unclear. As Commissioner Pai pointed out, the NPRM did not, in fact, propose any rules.[28]

There is, in fact, no sense to be made of the screen, beyond its stated purpose to quickly eliminate those local markets that clearly require no competitive review. All that can be said in support of the screen as a measure of harm, on the other hand, is that it is marginally less arbitrary and open to manipulation than the previous *per se* spectrum cap, which, incredibly, the Commission is now considering reinstating.

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[26] Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 04-70, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21552 ¶¶ 58, 106-112 (2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-255A1.pdf.

[27] *In the Matter of Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Notice of Proposed Rulemaking (Sept. 28, 2012), http://www.fcc.gov/document/mobile-spectrum-holdings-nprm.

[28] Concurring Statement of Commissioner Ajit Pai, *In re Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, at 49 (Sept. 28, 2012) ("[T]oday's Notice of Proposed Rulemaking contains no notice of proposed rules."), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-119A1.pdf#page=49.

A Modest Proposal for Reform

Against these dangerous pseudo-analytic tools, the proposed FCC Process Reform Act proposes several common-sense reforms. None of them should be the least bit controversial.

They would mandate such obvious improvements as requiring the FCC to identify actual consumer harms before regulating to correct them; to conduct realistic economic analysis; to subject proposed remedies to neutral cost-benefit analysis; to consider more effective alternatives; and to evaluate the performance of rules after they have been put into effect.

That minimal level of analytic rigor has long been mandatory for Executive agencies. As if such confirmation were necessary, in 2011, President Obama made clear that he expected (though could not require) the same basic tools be applied as a matter of course by independent regulatory agencies including the FCC.[29]

The proposed FCC Process Reform Act goes farther in the direction of common sense. The bill would codify informal shot clocks that today fail to impose needed deadlines on agency action. It would require, sensibly, that a Notice of Proposed Rulemaking be preceded by a Notice of Inquiry. This would ensure the agency has first established the need for rules before proposing them.

For rules and amendments that may have a significant economic impact, the proposed bill would require the agency to identify specific market failures, actual consumer harm, the burden of existing regulation and a "reasoned determination that the benefits of the adopted rule or amendment justify its costs," taking into account alternative forms of regulation. In deference to the realities of markets involving digital technology, it also sensibly requires that the agency consider the possibility that "market forces or changes in technology are unlikely to resolve within a reasonable amount of time the specific market failure" or actual consumer harm.

For the increasingly urgent problem of unstructured transaction review, the proposed FCC Process Reform Act would require the agency to tailor attached approval conditions to those that remedy actual harms to consumers that result from the proposed license transfer, and limit those remedies to those within the statutory powers of the FCC when it acts outside the review process. It erases the fiction that "voluntary" commitments are anything of the kind,

[29] Exec. Order No. 13,579, 76 Fed. Reg. 70913 (July 11, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies.

requiring likewise that such commitments be limited to remedies already within the agency's statutory and Constitutional boundaries.

Together, these reforms would greatly improve the transparency and consistency of the FCC's processes and impose realistic deadlines on agency decision-making, reducing the potential for a meandering review or rulemaking to take dangerous turns.

In effect, these modest process improvements replace the free-ranging and often-opaque decision making processes of today's FCC with the reasonable and uncontroversial tool of cost-benefit analysis. Ensuring that the costs of regulation do not exceed their benefits, and requiring agencies to consider alternative rules that could address the same harms more efficiently, has been a goal of "good government" reform for decades. It is an entirely bi-partisan goal.

Indeed, it is a goal shared by the current Administration. In a 2011 Executive Order, President Obama imposed precisely the same rigor on executive agencies.[30] Echoing the proposed FCC Process Reform Act, the Executive Order requires executive agencies to:

> (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.[31]

[30] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.
[31] *Id.*

The Executive Order, likewise, requires departments and executive agencies to operate with the same level of transparency called for in the proposed FCC Process Reform Act. Specifically, the order called for agencies:

> to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.[32]

There is no relevant reason these common-sense requirements should not apply to independent regulatory agencies such as the FCC, which the President made clear in a subsequent Executive Order extending earlier Orders to independent regulatory agencies, "to the extent permitted by law"[33]

Indeed, given the increasingly significant economic impact of FCC decisions affecting the broadband ecosystem, these reforms are even more urgently needed to meet what the President defined as the goal of cost-benefit analysis: not to neuter regulatory agencies or deny them flexibility but to "protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."[34]

The FCC's expert staff stands ready, willing and able to help the Commission make reasoned, timely decisions based on simple, economically sound principles that are grounded in real data. The agency already has the capacity to operate transparently, involving the public and explaining itself coherently to consumers. But it must be weaned from the inconsistent and

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[32] *Id.*

[33] *See* Exec. Order No. 13,579, *supra* note 29.

[34] *See* Exec. Order No. 13,563, *supra* note 30. Congress has already mandated such analysis for regulations that affect small businesses, a requirement largely irrelevant to FCC actions. *See* Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies* (April 30, 2013), *available at* http://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf.

dangerous practice of confounding markets with unwise and irrelevant rulemakings, amendments, orders and auction and transaction conditions.

The FCC, as noted, already collects precisely the kind of data it needs to perform meaningful analysis, yet time after time the agency steps back from the brink just before reaching a reasoned decision. Replacing the unstructured processes that have developed in recent decades with the kind of rigorous tools called for in both the President's Executive Order and the proposed FCC Process Reform Act would take the FCC far along the road toward the 21st Century, where we urgently need it to be.

Big Bang Disruption and Regulatory Humility

At a minimum, the FCC should be required to justify its interventions in the market the same level of analytical rigor that Presidents of both parties have long demanded of Executive Agencies. But if anything, the FCC needs to exercise more caution than other agencies. That is because its authority is entirely within zones of economic activity undergoing persistent, dramatic and accelerating technological disruption.

I have recently completed a multi-year research project, in collaboration with Paul F. Nunes, Global Managing Director of the Accenture Institute for High Performance. Our study focused on the changing nature of economic transformation in response to technologies, such as those at the core of the computing and communications sectors, that continue to become both better and cheaper at the same time over long periods of time. We refer to such "disruptors," which include commodities such as computer processors, storage, and data transit, as "exponential technologies."

My co-author and I reported our initial results in a recent cover story for the ***Harvard Business Review,*** which I have included as an Appendix.[35]

Our principal finding is that over the last decade, the pace and the intensity of disruption has increased in every industry, particularly in those whose core products and services are built on exponential technologies. These industries are now experiencing what we refer to as "Big Bang Disruption," where new products and services can emerge overnight from the primordial ooze of direct market experimentation and the combination of off-the-shelf components readily connected to each other at profoundly reduced research and development costs.

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[35] Larry Downes and Paul F. Nunes, *Big Bang Disruption*, HARVARD BUSINESS REVIEW 44 (March 2013).

These disruptors are unique in economic history in that they emerge both better and cheaper than established products and technologies. In a matter of days or weeks, as a result, consumers can abandon the old for the new, leaving incumbent providers little time or opportunity to respond. The result is often the decimation of long-standing industry supply chains, a sudden and violent version of what economist Joseph Schumpeter famously characterized as the "perennial gale of creative destruction" of modern capitalist economies.[36]

The smartphone alone has already spawned many such disruptors. Consider just a partial list of the products and services already or soon-to-be retired by mobile devices, including: address books, video cameras, pagers, wristwatches, maps, books, travel games, flashlights, home telephones, Dictaphones, cash registers, Walkmen, day timers, alarm clocks, answering machines, yellow pages, wallets, keys, phrase books, transistor radios, personal digital assistants, dashboard navigation systems, remote controls, newspapers and magazines, directory assistance, travel and insurance agents, restaurant guides and pocket calculators—just to name a few.

This accelerating pace of industry change, I believe, has profound implications for the regulatory process, particularly for agencies operating at the center of the perennial gale. For one thing, the deliberative pace of regulation increasingly means that by the time rules are made, transactions are reviewed, or practices scrutinized for violations, consumers, markets, and providers have long since moved on. Dynamic technology-driven markets, in other words, increasingly remedy their own harms, more quickly and far more efficiently than regulators can.

At the same time, it is simply impossible even for those of us in Silicon Valley and other technology hubs to predict how exponential technologies will evolve and the kinds of markets they will both create and destroy. The FCC must be cured of an institutional hubris that suggests otherwise. The agency's rules, amendments, orders, auction designs and transaction conditions reflect a profoundly dangerous belief that, despite being disconnected from the messy realities of Big Bang industries, the agency can nonetheless predict the future and head off consumer harms that haven't yet occurred.

But the Commission cannot predict the future, even in the short term. No one can. Most of us in the technology sectors have stopped trying. So in addition to replacing the agency's non-processes with the rigor and consistency of basic cost-benefit analysis, I urge both the FCC and Congress to introduce, as part of that analysis, a healthy dose of technological humility—a

[36] Joseph A. Schumpeter, CAPITALISM, SOCIALISM, AND DEMOCRACY (Harper 3d ed. 2008) (1942).

recognition that the costs of regulators getting it wrong often outweigh the costs of not intervening.[37]

This takes the form of the additional requirement, explicit in the modest process reforms already proposed for rulemakings, that in transaction reviews, auction designs, orders and amendments, the FCC must seriously consider the potential for emerging technologies to resolve existing or theoretical consumer harms without the need for intervention.

The FCC should, as proposed in the draft bill, be required to adopt the sensible requirement that it consider the balance of both the costs and benefits of proposed rules, amendments, orders, auction designs and transaction conditions, as well as considering alternative remedies that would solve demonstrated consumer harms more efficiently.

But before taking action, the agency should ***also*** be required to make a reasoned determination that the specific market failure identified will not otherwise be corrected without regulatory intervention. The FCC should be require to demonstrate, in other words, that market forces driven by technological disruptors would not otherwise remedy specific consumer harms within a reasonable period of time absent the proposed rule, amendment, order or condition.

Notably, this was precisely the approach taken by the Department of Justice, for example, in its separate review of the Sirius/XM merger. In its four-page statement closing its in 2008, the Antitrust Division easily concluded that transaction was "not likely to harm consumers." Even though the two parties represented the entire satellite radio market, the Division sensibly found that new forms of competition driven by emerging digital technologies would be more than adequate to discipline the merged entity:

> Any inference of a competitive concern was further limited by the fact that a number of technology platforms are under development that are likely to offer new or improved alternatives to satellite radio. Most notable is the expected introduction within several years of next-generation wireless networks capable of streaming Internet radio to mobile devices. While it is difficult to predict which of these alternatives will be successful and the precise timing of their availability as an attractive alternative, a significant number of consumers in the

[37] Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, George Mason Law & Economics Research Paper No. 09-54 (Oct. 27, 2012) ("It is because of these dynamic and often largely unanticipated consequences of novel technological innovation that both the likelihood and social cost of erroneous interventions against innovation are increased."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490849.

> future are likely to consider one or more of these platforms as an attractive alternative to satellite radio. The likely evolution of technology played an important role in the Division's assessment of competitive effects in the longer term because, for example, consumers are likely to have access to new alternatives, including mobile broadband Internet devices, by the time the current long-term contracts between the parties and car manufacturers expire.[38]

It took the FCC seventeen months and a hundred-plus page order to reach the same conclusion.[39] And despite the fact that the parties controlled only 5% of the overall audio market at the time of the merger, the FCC's eventual order was, as Commissioner McDowell noted at the time, "one of the most heavily conditioned in FCC history."[40]

Needless to say, the emergence of even more forms of disruptive digital technologies for audio content than the Antitrust Division expected have already arrived, and sooner. Consumers have more choices for audio content than ever, including many from providers who did not exist at the time of the Sirius/XM merger.

As this example highlights, the market discipline of exponential technologies is an especially relevant criteria for the FCC to consider, particularly in designing imposed or voluntary transaction conditions and in the design of future spectrum auctions.

And since such conditions apply only to the parties in a proposed auction or license transfer, the agency should also be required to provide evidence that both the harm and the proposed remedy are entirely contained within the proposed license transfer.

If the behavior of other industry parties also contribute to the identified consumer harm, the agency should not wait for future transactions involving those parties to address the problem. If, independent of a proposed transaction, there is a genuine consumer harm that is not likely

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[38] Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc., Department of Justice (Mar. 24, 2008), http://www.justice.gov/opa/pr/2008/March/08_at_226.html.

[39] Federal Communications Commission Memorandum Opinion and Order and Report and Order, *In re Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57 (Aug. 5, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-178A1.pdf.

[40] Statement of Commissioner Robert M. McDowell, *In re Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, p. 109 (Aug. 5, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-178A1.pdf.

to be corrected by technological disruptors, the FCC should simply issue a Notice of Inquiry and, if warranted, a Notice of Proposed Rulemaking.

Rather than use transaction reviews as piecemeal rulemakings, in other words, the agency should be required, when non-parties are also partly or wholly the cause of the demonstrated harm, to propose its remedy as a rulemaking. In addition to reducing the incidence of inconsistent rules applied to different parties in different markets at different times, this would also ensure that such rules, when they are truly needed, are subjected to both the notice-and-comment process and the possibility of judicial review. Neither is possible when rulemakings are embedded in auction designs and transaction conditions.

Conclusion

I began these comments with reference to Ronald Coase, who turned 102 last year. Coase's work is in fact at the core of all of my recommendations. He is the father of the now conventional wisdom that regulations impose costs, and he was first to propose that such costs should be weighed against their benefits and compared to the costs of alternative remedies, including market-based solutions midwifed by new technological innovation.[41]

And it was Coase who first recognized the value and fungibility of spectrum, proposing the very idea of auctioning frequencies, and to look to the market, rather than the FCC, both to resolve technical problems of interference and to ensure that available bands were put to their best and highest use.[42]

But I want to conclude with the wisdom of another sage, who said of the best ways to improve FCC process:

> The FCC is currently structured along the traditional technology lines of wire, wireless, satellite, broadcast, and cable communications. As the lines between these industries merge and blur as a result of technological convergence and the removal of artificial barriers to entry, the FCC needs to reorganize itself in a way that recognizes these changes and prepares for the future. A reorganization of the agency along functional rather than technology lines will put the FCC in a

[41] Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 43 (1959).
[42] Ronald Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 9 (1959).

> better position to carry out its core responsibilities more productively and efficiently.[43]

The author of that recommendation is former FCC Chairman William Kennard, whose prescient 1999 "Strategic Plan" for the agency still stands as a brilliant and largely unfulfilled vision for a 21st century Commission. The Plan foresaw much of the convergence in technologies and industries that have since unfolded. In advance of the information revolution, the Plan proposed a new structure for the FCC that could, if implemented, still greatly improve its efficiency and, in particular, the Commission's ability to manage spectrum, promote competition, and encourage consumer adoption across all demographic boundaries — in short, to fulfill the agency's core mission.

By eliminating obsolete reporting requirements for the agency and consolidating the remaining reports into a single bi-annual schedule, the proposed Consolidated Reporting Act would take us at least one step in the direction Kennard proposed almost fifteen years ago.

In addition to simplifying the reporting process and saving wasted taxpayer dollars by producing multiple overlapping reports, consolidating to a single report will encourage the FCC to recognize explicitly what is obvious to all consumers: the convergence of many if not all of the communications technologies the agency oversees, and the growing interdependence and inter-modal competition within the Internet ecosystem, where content, communications, and computing have mingled in ways that produce profound new value for consumers.

Consolidated reporting would force the FCC's bureaus to tear down the walls that anachronistically divide them today, imposing the kind of methodological rigor that, as I have said, the agency desperately needs across its activities.

Appendices

- Larry Downes and Paul F. Nunes, *Big Bang Disruption*, HARVARD BUSINESS REVIEW 44 (March 2013).

[43] FCC, STRATEGIC PLAN: A NEW FCC FOR THE 21ST CENTURY (1999), http:// transition.fcc.gov/2 1st century/draft-strategicplan.pdf.

- Larry Downes, *The FCC Scores a Hat Trick of Errors on Internet Regulation*, FORBES (Aug. 27, 2012), http://www.forbes.com/sites/larrydownes/2012/08/27/the-fcc-scores-a-hat-trick-of-errors-on-internet-regulation/.
- Larry Downes, *For AT&T Merger, Spring Dusts Off Its Christmas List*, CNET (May 25, 2011), http://news.cnet.com/8301-1035_3-20065545-94.html.
- Larry Downes & Geoffery A. Manne, *The FCC's Unstructured Role in Transaction Reviews*, 1 CPI ANTITRUST CHRONICLE 1 (2012).
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- Larry Downes, *A Strategic Plan for the FCC: The Future Ain't What it Used to Be*. FORBES (DEC. 5, 2011), http://www.forbes.com/sites/larrydownes/2011/12/05/a-strategic-plan-for-the-fcc-the-future-aint-what-it-used-to-be-2/.
- Comments of TechFreedom, *In the Matter of Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 (Nov. 28, 2012), *available at* http://apps.fcc.gov/ecfs/document/view?id=7022068538.
- Comments of TechFreedom, *In the Matter of the Technological Transition of the Nation's Communications Infrastructure*, GN Docket No. 12-353 (Feb. 25, 2013), *available at* http://techfreedom.org/sites/default/files/TF_IP_Transition_Reply.pdf.

Mr. WALDEN. Mr. Downes, we appreciate your testimony.

We will go now to Mr. Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law at the George Washington University Law School. Mr. Pierce, thank you for being here today, and we look forward to your testimony, sir.

STATEMENT OF RICHARD J. PIERCE, JR.

Mr. PIERCE. Thank you, Chairman Walden, Ranking Member Eshoo and members of the subcommittee. It is a privilege for me to be able to appear before you today to discuss the proposed Federal Communications Commission Reform Act of 2013.

I have taught administrative law for 36 years. I have written over a dozen books and 120 scholarly articles on administrative law. My books and articles have been cited in hundreds of judicial opinions including over a dozen opinions of the United States Supreme Court. I am also a member of the Administrative Conference of the United States.

I will discuss the provisions of the proposed Act that relate to the procedures the Federal Communications Commission is required to use to issue rules. I will not discuss the provisions that relate to the substantive principles the FCC is required to apply in its decision-making. I am not an expert on communications law, so I lack an adequate basis to discuss proposed changes in the substance of communications law.

The proposed FCC Process Reform Act would add 12 judicially enforced mandatory steps to the notice and comment rulemaking procedure required by Section 553 of the Administrative Procedure Act. Those new mandatory, judicially enforced steps are: a minimum 30-day period for submitting comments; a minimum 30-day period for submitting reply comments; a mandatory notice of inquiry issued within 3 years of the issuance of the notice of proposed rulemaking; mandatory inclusion of the language of the proposed rule in the notice of proposed rulemaking; an identification of the specific market failure the proposed rule addresses; a determination that the benefits of the proposed rule exceed its costs; a determination that market forces or changes in technology are unlikely to address the specific market failure addressed by the rule; advanced provision of a list of the available alternative options to all Commissioners, provision of the language of the proposed rule to all Commissioners well in advance of any meeting scheduled to consider a proposed rule; publication of the text of the proposed rule in advance of the meeting; adoption of performance measures for any program activity created or amended by the rule, and a finding that such performance measures will be effective to evaluate the activity created or amended by the rule.

None of these procedures are in the Administrative Procedure Act. Every one of them is an add-on to the procedures in the APA. In my opinion, the proposed Act would not improve the FCC decision-making procedure. As I explain in greater detail in my written testimony, the proposed Act would have two serious adverse effects. First, it would be a significant departure from the wise decision Congress made in 1946. After 15 years of debate and an unprecedented amount of empirical research, Congress unanimously enacted Section 553 of the Administrative Procedure Act. That statu-

tory provision creates a uniform set of procedures that all agencies are required to use when they issue rules.

The APA was one of the most thoroughly debated and carefully researched statutes ever enacted. It was premised on the belief that creation of a uniform set of procedures applicable to all agency rulemaking was critically important to the Nation. The Supreme Court has spent the last 67 years resisting the periodic attempts to return to the confusing, uncertain and ad hoc world that preceded the passage of the Administrative Procedure Act, yet that is exactly what this bill would do. It would move us back in that direction.

Second, it is a bad idea to add 12 mandatory, judicially enforced procedures to a process that is already long and resource intensive. The proposed Act would add many additional procedures to the FCC rulemaking process, so many mandatory procedures that the agency would be able to issue, amend or rescind few, if any, rules. It would slow down the decision-making process dramatically. That is exactly the opposite of what you want to happen in a highly volatile market like telecommunications. As I discuss in detail in my written testimony, great jurists like Chief Justice Rehnquist and D.C. Circuit Judge Cavanaugh have urged rejection of similar efforts to impose such burdens on the rulemaking process.

That concludes my testimony. I would be glad to answer any questions you might have.

[The prepared statement of Mr. Pierce follows:]

Testimony of Richard J. Pierce, Jr.
Lyle T. Alverson Professor of Law
George Washington University

Before the
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology

Hearing on
Improving FCC Process

July 11, 2013

Summary of Testimony

In my opinion, the provisions of the proposed Federal Communications Commission Process Reform Act of 2013 that would add twelve new mandatory steps to the rulemaking process created by the Administrative Procedure Act (APA) would not improve the FCC decision making process. To the contrary, those changes would be a major step in the wrong direction.

The addition of twelve mandatory steps to the FCC rulemaking process would be a return to the uncertain, confused, ad hoc world of agency decision making that the Congress wisely and unanimously rejected when it enacted the APA in 1946. Section 553 of the APA created a uniform rulemaking procedure applicable to all agencies. For sixty-seven years, the Supreme Court has attempted to preserve and protect that sensible uniform decision making procedure from attempts to eviscerate it by returning to the uncertain, confused, and ad hoc situation that existed prior to enactment of the APA. Yet, that is exactly what the proposed Act would accomplish.

Moreover, the proposed Act would impose on the FCC mandatory rulemaking procedures that would be extremely burdensome, resource-intensive, and time-consuming. I agree with great jurists like Chief Justice Rehnquist and D.C. Circuit Judge Kavanagh that we should not add more sources of delay and cost to the rulemaking process at the FCC.

Testimony of Richard J. Pierce, Jr.
Lyle T. Alverson Professor of Law
George Washington University

Before the
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology

Hearing on
Improving FCC Process

July 11, 2013

Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, it is a privilege for me to be able to appear before you today to discuss the proposed Federal Communications Commission Process Reform Act of 2013. My references in this testimony are to the version of the proposed Act contained in the discussion draft circulated by Chairman Walden on July 8, 2013.

I have taught administrative law for thirty six years. I have written over a dozen books and 120 scholarly articles on administrative law. I have attached a copy of my cv, including a list of my publications, to this testimony. My books and articles have been cited in hundreds of judicial opinions, including over a dozen opinions of the United States Supreme Court. I am also a member of the Administrative Conference of the United States.

I will discuss the provisions of the proposed Act that relate to the procedures the Federal Communications Commission (FCC) is required to use to issue rules. I will not discuss the provisions that relate to the substantive principles FCC is required to apply in its decision making. Thus, for instance, I will not discuss proposed section 13(j), which would narrow the FCC's power to impose conditions on some transactions that are within

the FCC's jurisdiction. I am not an expert on communications law, so I lack an adequate basis to discuss proposed changes in the substance of communications law.

Generally, the proposed changes in the procedures FCC is required to use to issue rules would move the country in the wrong direction by reversing the wise decision that Congress made in 1946 to create a uniform set of rulemaking procedures applicable to all agencies by enacting the Administrative Procedure Act (APA).[1] The proposed Act would replace the relatively simple set of decision making procedures that section 553 of the APA makes applicable to rulemakings by all agencies with an extremely detailed set of procedures uniquely applicable to FCC rulemakings. Those procedures would be far more demanding than those used by any other agency.

The APA has proven to be one of the most durable and most successful statutes ever enacted. It remains in effect today with only a few minor amendments. It continues to govern all decision making by all federal agencies. Congress should not eviscerate the APA on a piecemeal basis by returning to the disastrous legal regime that preceded the APA.

Professor George Shepherd has published a comprehensive history of the APA.[2] The process of drafting what became the APA began in the early 1930s. At that time, each federal agency used different procedures for making most decisions, including issuance of rules. There was universal agreement that the situation was intolerable. It created great uncertainty for lawyers, their clients, and the courts. Without the ability to generalize about administrative procedures, a court had no way of knowing whether and

[1] 5 U.S.C. §§551-808.
[2] George Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges for New Deal Politics, 90 Northwestern University Law Review 1557 (1996).

to what extent a judicial decision it issued with respect to the procedures used by one agency applied to other agencies. Lawyers and their clients were also at a loss to know the law applicable to agency decision making procedures. A judicial precedent issued with respect to one agency might or might not have some application to other agencies. Thus, there was unanimous agreement that the ad hoc, uncertain, and highly variable procedures agencies were using had to be replaced by a uniform legal framework that specified the procedures all agencies were required to use to make decisions of various types.

During the 1930s, however, agreement among members of the House and Senate extended only to the need to create a uniform set of procedures applicable to all agencies. Members differed significantly with respect to the specific procedures that agencies should be required to use. As Professor Shepherd described in detail, Congress engaged in intense debate with respect to the contents of the APA throughout the 1930s.

In the 1940s, a growing body of empirical research gradually changed the nature of the debate. Walter Gellhorn, who is often referred to as the father of administrative law, chaired a committee that was assigned the task of drafting legislation that would bridge the yawning gap between the views of the participants in the congressional debate. Gellhorn oversaw the process of writing a series of monographs that described and analyzed the decision making procedures used by twenty-seven agencies. For the first time, the participants in the debate were able to appreciate the wide variety of procedures agencies used to issue rules and were able to evaluate the proposal made by Gellhorn's committee with reference to the realities of the confused and highly variable status quo.

The introduction of empirical research into the debate eventually led to a compromise Bill that was enacted unanimously by both the House and the Senate.

As Professor Shepherd has noted:

> The landmark Administrative Procedure Act (APA) was the bill of rights for the new regulatory state. Enacted in 1946, the APA established the fundamental relationship between regulatory agencies and those whom they regulate -- between government, on the one hand, and private citizens, business, and the economy, on the other hand. The balance that the APA struck between promoting individuals' rights and maintaining agencies' policy-making flexibility has continued in force, with only minor modifications, until the present.[3]

The key to the successful conclusion of the fifteen year debate about administrative procedure was the empirical research that formed the basis for the Bill that became the APA. As Republican Congressman Hancock stated at the time of the unanimous House vote to enact the APA: "I regard the report which accompanies this bill as the most complete and scholarly report that has ever accompanied any bill to come before us in my time."[4]

The durability and continued success of the APA is attributable in large measure to the efforts of the U.S. Supreme Court over the past sixty-seven years to adopt sensible interpretations of its language and to protect the APA from the potentially destructive effects of the agency-specific doctrines and precedents that have a tendency to develop over time.[5] The Court has consistently resisted efforts to establish procedures that are unique to particular agencies and has emphasized "the importance of maintaining a uniform approach to judicial review of administrative action."[6] The modern Supreme Court agrees with the unanimous view of the Members of the Congress in 1946 that it is

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[3] Id. at 1558.
[4] Administrative Procedure Act: Legislative History, 79th Cong., 1944-46 at 372 (1946).
[5] See generally Robert Glicksman & Robert Levy, Agency-Specific Precedents, 89 Texas Law Review 499 (2011).
[6] Dickinson v. Zurko, 527 U.S. 150, 154 (1999).

possible to continue to use and to improve on a set of efficient and predictable agency decision making procedures only if they are uniform among regulatory agencies. The Court has consistently rejected attempts to return to the confusing, uncertain, and ad hoc world that preceded enactment of the APA. Yet, that is exactly what the proposed FCC Process Reform Act would do.

Turning from the general to the particular, the proposed FCC Process Reform Act would add seven mandatory steps to the notice and comment rulemaking process required by the APA. Those new mandatory steps are: (1) a minimum 30-day period for submitting comments; (2) a minimum 30-day period for submitting reply comments; (3) a mandatory Notice of Inquiry issued within 3 years of the issuance of the Notice of Proposed Rulemaking; (4) mandatory inclusion of the language of the proposed rule in the Notice of Proposed Rulemaking; (5) advance provision of a list of the available alternative options to all Commissioners; (6) provision of the language of the proposed rule to all Commissioners well in advance of any meeting scheduled to consider a proposed rule; and, (7) publication of the text of the proposed rule in advance of the meeting. The Act would add three other mandatory procedures in the case of any proposed rule or amendment that would have an "economically significant impact." Those procedures are: (1) an identification of the specific market failure the proposed rule addresses; (2) a determination that the benefits of the proposed rule exceed its costs; and, (3) a determination that market forces or changes in technology are unlikely to resolve the specific market failure within a reasonable period of time. The Act would add two other mandatory procedures in the case of rulemakings that would create or amend a program activity: (1) adoption of performance measures, and (2) a finding that such

performance measures will be effective to evaluate the activity created or amended by the rule. Compliance with each of these twelve new mandates would be subject to review by a court.

There is nothing inherently wrong with any of the twelve procedures that the Act would make mandatory. In my decades of studying the rulemaking process, I have come across rulemakings in which agencies have used each of these procedures, though I have never seen any rulemaking in which an agency used all of the procedures that the FCC Process Reform Act would make mandatory. Each of the twelve additional procedures has advantages that cause it to be a potentially beneficial addition to a notice and comment rulemaking in some cases. Each also has serious disadvantages as well, however. At a minimum, each becomes a source of additional delay and commitment of agency resources in a decision making process that is already lengthy and resource-intensive. Moreover, mandating each of twelve additional procedures increases greatly the risk that a reviewing court will identify some procedural flaw in the rulemaking that requires the agency to begin the arduous process a second time.

Sometimes the benefits of adding one of the twelve procedures identified in the proposed Act are justified by the costs of the additional procedure, but sometimes they are not. The circumstances in which agencies issue, amend, or rescind rules vary far too much to make an across-the-board determination in advance that the agency should be required to add any of these procedures to the rulemaking process. That decision should be left to the agency to make in each case. Only the agency has access the facts needed to make a decision whether to add any of these twelve procedures to the notice and comment process required by the APA.

Speaking for a unanimous Supreme Court, Chief Justice (then Justice) Rehnquist made this point well in 1978:

> But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" Indeed, our cases could hardly be more explicit in this regard. The Court has upheld this principle in a variety of applications, including that case where the District Court, instead of inquiring into the validity of the Federal Communications Commission's exercise of its rulemaking authority, devised procedures to be followed by the agency on the basis of its conception of how the public and private interest involved could best be served. Examining § 4(j) of the Communications Act of 1934, the Court unanimously held that the Court of Appeals erred in upholding that action. And the basic reason for this decision was the Court of Appeals' serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.[7]

D.C. Circuit Judge Kavanagh made a similar point in a 2008 opinion in which he criticized his colleagues for imposing on FCC procedural mandates that he believed to be beyond those required by the APA:

> Over time, those twin lines of decisions have gradually transformed rulemaking—whether regulatory or deregulatory rulemaking—from the simple and speedy practice contemplated by the APA into a laborious, seemingly never-ending process. The judicially created obstacle course can hinder Executive Branch agencies from rapidly and effectively responding to changing or emerging issues within their authority, such as consumer access to broadband, or effectuating policy or philosophical changes in the Executive's approach to the subject matter at hand. The trend has not been good as a jurisprudential matter, and it continues to have significant practical consequences for the operation of the Federal Government and those affected by federal regulation and deregulation.[8]

I agree completely with Chief Justice Rehnquist and Judge Kavanagh. Adding mandatory procedures to the APA notice and comment rulemaking process is a bad idea. Adding

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[7] Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-44 (1978) (citations omitted).
[8] American Radio Relay League v. FCC, 524 F.3d 227, 248 (D.C. Cir. 2008).

twelve such procedures to FCC rulemaking would render it nearly impossible for FCC to issue, amend, or rescind rules.

This concludes my testimony. I would be pleased to respond to any questions you might have.

Mr. WALDEN. I appreciate your testimony, Mr. Pierce, and we will now move to Randolph J. May, who is the President of the Free State Foundation.

Mr. May, thanks for being here today. We look forward to your comments.

STATEMENT OF RANDOLPH J. MAY

Mr. MAY. Thank you, Mr. Chairman. I would like to borrow Professor Pierce's booming voice for my testimony.

Chairman Walden, Ranking Member Eshoo and members of the committee, again, thank you for inviting me to testify today. I am President of the Free State Foundation, a nonprofit research and educational foundation. FSF is a think tank that focuses its work primarily in the communications law and policy and administrative law areas. I have been involved for 35 years in communications policy in various capacities including having served as Associate General Counsel at the FCC. I am a past chair of the American Bar Association's section of administrative law, and I am a public member of the Administrative Conference of the United States. So today's hearing on FCC process reform is at the core of my longstanding experience and expertise in communications law and policy and administrative law.

I appreciated the opportunity to testify before this committee a bit more than 2 years ago. Though H.R. 3309 and 3310 both passed the House, unfortunately they died in the Senate. Reform measures such as those embodied in the present discussion drafts are needed now more than ever. In my June 2011 testimony, I generally supposed the proposed reforms, and I do so again today because the FCC's decision-making needs to change so that in today's generally dynamic competitive telecommunications marketplace, the agency will be less prone to continue on its course of too often defaulting to regulatory solutions even when there is no convincing evidence of market failure or consumer harm.

The FCC still operates today with a pro-regulatory proclivity pretty much as it did in 1999 when the Clinton Administration's FCC Chairman Kennard called for the reorientation of the agency's mission to account for the increasingly competitive environment evident even then. After having served at the FCC from 1978 through 1981, when President Carter's FCC chairman was initiating efforts to reduce regulation in light of the new forms of competition already emerging then, I believe that regulatory reform measures like those embodied in the discussion drafts and the few additional ones that I advocate in my testimony deserve bipartisan support.

In the time that I have, without taking anything away from the significance of some of the other proposed reforms, I want to highlight the rulemaking requirements and transaction review proposals because they are especially important. It is true, of course, that as some of the bill's opponents charge, new Section 13(a) would require the FCC to make additional findings and undertake additional analysis beyond that presently required before it imposes new rules. For example, the FCC would be required to analyze whether there is a market failure, and it would be required to perform a cost-benefit analysis, and the Commission would be

required to provide a reasoned explanation as to why market forces and technology changes will not within a reasonable time period resolve the agency's concerns. Frankly, in today's communications environment, you would hope the FCC would be doing these things anyway, but the reality is, that it often doesn't. There is nothing inherent in sound principles of administrative law that suggests Congress should not impose particular sector-specific analytical decision-making requirements when circumstances warrant. While general theories of administrative law are nice and can be relevant, in general they are not necessarily applicable to a specific marketplace sector or regulator, and this is especially true in this particular marketplace sector, which due largely to rapid changes in technology is generally competitive.

Indeed, I urge the committee to go a step further by specifying that the reasoned determination required concerning whether market forces or changes in technology are unlikely to resolve the Commission's concern must be based on clear and convincing evidence. This change will not prevent the Commission from adopting new regulations, and it is not intended to do so. It simply requires the agency to meet an evidentiary burden before adopting or revising regulations.

The transaction review provisions contained in Section 13(k), especially the addition that allows the Commission the conditional approval of a proposed transaction only if the condition addresses a likely harm uniquely presented by the specific transaction would go a long way towards combating the FCC's abuse of the transaction review process. The agency often has abused the process by delaying approval of transactions until the applicants "voluntarily" agree, usually at the midnight hour, to conditions that are not narrowly tailored to remedy a harm arising from the transaction or unique to it.

I also suggest the committee reform the forbearance and periodic regulatory review process by in effect requiring a higher evidentiary burden to maintain existing regulations on the books. Actually, I understand from what Representative Latta said that maybe he agrees with that. Absent clear and convincing evidence that the regulations at issue should be retained under the existing substantive statutory criteria, regulatory relief should be granted. Similarly, I propose adoption of a sunset requirement so that all rules will automatically expire after X years absent a showing based on clear and convincing evidence that it is necessary for such a rule to remain in effect to accomplish its original objective.

Again, thank you for inviting me to testify today. I will be pleased to answer your questions.

[The prepared statement of Mr. May follows:]

Testimony of Randolph J. May

President, The Free State Foundation

Hearing on "Improving FCC Process"

before the

Subcommittee on Communications and Technology

Committee on Energy and Commerce

U.S. House of Representatives

July 11, 2013

Summary of the Testimony of Randolph J. May
President, The Free State Foundation

I commend the Committee for undertaking this effort to reform the FCC's processes and its decision-making approaches, and I support the proposed reforms in the Discussion Drafts. Given the increasing competiveness in the communications marketplace, FCC reforms, such as those embodied in the draft bills, are needed now more than ever.

The FCC still operates today with a pro-regulatory bent pretty much as it did in 1999 when FCC Chairman William Kennard called for the reorientation of the agency's mission to account for the increasingly competitive environment evident even then. The reforms in the draft bills, along with a few additional proposals I will suggest, would make the FCC less likely to default so often to regulatory measures, even absent clear and convincing evidence of market failure or consumer harm. In today's marketplace environment, the default position should not be regulation.

I wish to highlight here the proposed reform of the rulemaking requirements and the transaction review process because they are especially consequential. New Section 13(a)(2)(C)(iii)'s requirement that the Commission, before adopting a new or revised rule, provide a reasoned explanation why market forces and technology changes will not, within a reasonable time period, resolve the agency's concerns is particularly welcome. I urge the Committee to go a step further to make it more difficult for the Commission to avoid the import of this provision while carrying on "business as usual." I suggest revising the provision to read: "(iii) a reasoned determination, based on clear and convincing evidence, that market forces or changes in technology...." This change will not prevent the Commission from adopting any new regulations, and it is not intended to do so. But, without altering the substantive criteria the bill specifies, the suggested change simply requires the agency to meet a higher evidentiary burden before adopting or revising regulations.

The provisions contained in new Section 13(k), especially the addition that would allow the Commission to condition approval of a proposed transaction only if the condition addresses a likely harm uniquely presented by the specific transaction, would go a long way toward combatting abuse of the transaction review process. Over time, the agency increasingly has abused the merger review process by delaying approval of transactions until the applicants "voluntarily" agree – usually at the "midnight hour" – to conditions not narrowly tailored to remedy a harm arising from the transaction or unique to it.

I also suggest the Committee reform the forbearance and periodic regulatory review process by, in effect, requiring a higher evidentiary burden to maintain existing regulations on the books. Absent clear and convincing evidence that the regulations at issue should be retained under the existing substantive statutory criteria, regulatory relief should be granted. Similarly, I propose adoption of a "sunset" requirement so that all rules will automatically expire after five [or X] years absent a showing, based on clear and convincing evidence, that it is necessary for such rule to remain in effect to accomplish its original objective.

Testimony of Randolph J. May

President, The Free State Foundation

Mr. Chairman and Members of the Committee, thank you for inviting me to testify. I am President of The Free State Foundation, a non-profit, nonpartisan research and educational foundation located in Rockville, Maryland. The Free State Foundation is a free market-oriented think tank that, among other things, focuses its research in the communications law and policy and administrative law and regulatory practice areas. I have been involved for thirty-five years in communications law and policy in various capacities, including having served as Associate General Counsel at the Federal Communications Commission. While I am not speaking on behalf of these organizations, by way of background I wish to note that I am a past Section Chair of the American Bar Association's Section of Administrative Law and Regulatory Practice and its representative in the ABA House of Delegates. I am currently a Public Member of the Administrative Conference of the United States and a Fellow at the National Academy of Public Administration. So, today's hearing on FCC process reform is at the core of my longstanding experience and expertise in communications law and policy and administrative law and regulatory practice.

I appreciated the opportunity to testify before this Committee a bit more than two years ago on June 22, 2011, at the hearing on "Reforming the FCC Process," and I appreciate the opportunity to testify today.

Though H. R. 3309 and H. R. 3310 both passed the House, unfortunately they died in the Senate. I want to begin by saying that reform measures like those embodied in those bills and the present Discussion Drafts, or very similar ones, are needed now more

than ever. In my June 2011 testimony, I generally supported the proposed reforms, and I do so again today. I do so because the Federal Communications Commission needs to change in a way so that, in today's generally dynamic, competitive communications marketplace environment, it will be less prone to continue on its course of too often defaulting to regulatory solutions, even when there is no clear and convincing evidence of market failure or consumer harm.

In addition to supporting the Discussion Drafts, including the few changes that are included in the draft bills that were not part of H. R. 3309 and 3310, I want to suggest a few additional reform proposals for consideration as well. These proposals, though requiring only relatively small revisions to the language of the Communications Act, would be useful as complements to the measures proposed in the Discussion Drafts as a means of requiring the FCC to eliminate or reduce unnecessary regulation. And this point is key: They do so not by altering the substantive regulatory criteria presently in the Communications Act relating to protecting consumers and the public interest, but rather by establishing higher evidentiary burdens the Commission would be required to meet in deciding whether to maintain existing regulations or adopt new ones.

At the outset of my testimony two years ago, to set the stage for explaining why Congress should adopt FCC reform measures, I presented statements made over a decade ago by two different FCC commissioners. In August 1999, FCC Chairman William Kennard released a strategic plan entitled, "A New FCC for the 21st Century." The plan's first four sentences read:

> "In five years, we expect U.S communications markets to be characterized predominately by vigorous competition that will greatly reduce the need for direct regulation. The advent of Internet-based and other new technology-driven communications services will continue to erode the traditional regulatory

> distinctions between different sectors of the communications industry. As a result, over the next five years, the FCC must wisely manage the transition from an industry regulator to a market facilitator. The FCC as we know it today will be very different in both structure and mission."

In December 2000, then-FCC Commissioner (soon-to-be FCC Chairman) Michael Powell, in his "Great Digital Broadband Migration" speech, said: "Our bureaucratic process is too slow to respond to the challenges of Internet time. One way to do so is to clear away the regulatory underbrush to bring greater certainty and regulatory simplicity to the market."

These statements by two FCC Chairman, one a Democrat and the other a Republican, still provide a most useful frame for thinking about today's topic. Without belaboring the point now with all the latest marketplace facts and figures, we should be able to agree, regardless of party identification, that, as Bill Kennard predicted they would be, U.S. communications markets are now "characterized predominately by vigorous competition."

Despite the fact that the communications marketplace incontrovertibly is characterized by much more dynamism and competition now than at the turn of the century – and that economists and regulatory experts agree that increased marketplace competition generally should supplant the need for regulation – the FCC's staffing levels have maintained essentially level since 2000, and the amount the agency spends on regulation has increased substantially during that period. In both 2000 and today, the FCC's FTE employee count stands roughly in the 1900 range. And from 2000 to 2012, based on data extracted from the *Budget of the United States Government* and compiled by the Weidenbaum Center on the Economy, Government and Public Policy at

Washington University and the George Washington University Regulatory Studies Center, the amount the FCC spends on regulatory activity (in constant 2005 dollars) has increased from $303 million to $392 million.

While these figures are not intended to – and don't – show the benefits and costs of any particular regulations or suggest that regulation is not still appropriate in particular market segments or areas, they do suggest that the FCC still operates today with a pro-regulatory bent pretty much as it did in 1999 when Bill Kennard called for the reorientation of the agency's mission to account for the increasingly competitive environment and in 2000 when Michael Powell urged that the agency remake itself so that it can respond to the challenges of "Internet time."

Hence the need now for Congress to adopt meaningful FCC regulatory reform measures.

The Federal Communications Commission Process Reform Act

I support the proposals in the Process Reform Act Discussion Draft and commend the Committee for undertaking this effort. In my testimony, I just want to highlight here the provisions that I think are most important, suggest three relatively minor revisions to the language of the draft, and then propose three additional measures that I believe are consistent with the FCC reform the Committee is trying to accomplish.

Section 13(a) – Rulemaking Reforms. In light of what I have already said concerning the dynamic, generally competitive state of the communications marketplace, I want highlight new Section 13(a) relating to the adoption of new or revised FCC rules and especially Section 13(a)(2)(C). Section 13(a)(2)(C)'s requirement, regarding adoption or revision of a rule that may have an economically significant impact, that the

Commission must (i) identify and analyze the market failure and actual consumer harm the rule addresses; (ii) make a reasoned determination that the rule's benefits justify the costs; and (iii) make a reasoned determination that market forces and changes in technology are unlikely to resolve within a reasonable period of time the problem the Commission intends the rule to address is particularly important. As I have explained, despite the dramatic marketplace changes that have occurred over the past couple of decades, the Commission still too often defaults to regulatory solutions when they are not justified. Requiring the Commission to perform the identification and analysis and to make the determinations specified in Section 13(a)(2)(C) should be helpful in combatting the FCC's tendency to default to regulatory solutions without undertaking rigorous economic analysis, considering the cost and benefits of regulations, and evaluating marketplace conditions.

Section 13(a)(2)(C)(iii)'s requirement is a very welcome addition to the Process Reform Act that was not present in H. R. 3309. Requiring the Commission to explain in a reasoned way why market forces and technology changes will not, within a reasonable period of time, resolve the agency's concerns is consistent with recommendations I have made in the past. While the addition is positive, I would urge the Committee to go a step further in order to make it more difficult for the Commission to avoid the import of this provision while carrying on "business as usual." I suggest revising the provision to read: "(iii) a reasoned determination, based on clear and convincing evidence, that market forces or changes in technology…." This change will not prevent the Commission from adopting any new regulations, and, indeed, it is not intended to do so. Without altering the substantive criteria that the bill specifies the FCC must consider, the suggested

change simply requires the agency to meet a higher evidentiary burden before adopting or revising regulations.

Section 13(c) – Sunshine Act Reforms. I endorse the proposed changes to the Sunshine Act. Currently, the Act's strictures, without any meaningful public benefit, prevent the agency's five commissioners from engaging in the type of collaborative discussions that may lead to more reasoned decision-making. And they inhibit the development of greater collegiality among the commissioners, which itself may contribute to more effective functioning of a multi-member commission. I led a study in 1995 on this subject for the Administrative Conference of the United States, the results of which are published in 49 *Administrative Law Review* 415, which made recommendations somewhat similar to the draft bill's proposals.

Section 13(k) – Transaction Review Process Reforms. As I testified in 2011, the new Section 13(k) provision that would reform the Commission's transaction review process is as important as any other in the bill in light of the abuse of the process for many years now. The agency often imposes extraneous conditions -- that is, conditions not related to any alleged harms caused by the proposed transaction – after they are "volunteered" at the last-minute by transaction applicants anxious to get their deal done. The bill's requirement that any condition imposed be narrowly tailored to remedy a transaction-specific harm, coupled with the provision that the Commission may not consider a voluntary commitment offered by a transaction applicant unless the agency could adopt a rule to the same effect, go a long way to reforming the review process. But the Discussion Draft now contains an additional provision, Section 13(k)(1)(c), that allows the Commission to condition approval of the transaction only if the condition

addresses a likely harm uniquely presented by the specific transaction. This is a very good addition that will reduce the wiggle room for the Commission to continue abusing the transaction review process by imposing conditions that, if imposed at all, should be imposed only on an industry-wide basis in generic rulemaking proceedings.

I first suggested reforms exactly along these lines, including the new addition, in an essay entitled "Any Volunteers?" in the March 6, 2000 edition of *Legal Times*, so I am very pleased with the transaction review proposal. And as said in the *Legal Times* essay, and in my testimony in 2011, my own preference would be to go even further to reduce the substantial overlap in work and expenditure of resources that now occurs when the antitrust agencies and the FCC engage in a substantial duplication of effort. I would place primary responsibility for assessing the competitive impact of proposed transactions in the hands of the Department of Justice and the Federal Trade Commission, the agencies with the most expertise in this area. The FCC's primary responsibility then would be to ensure the applicants are in compliance with all rules and statutory requirements.

Other Provisions. I support the provision that would require publication of the text of agenda items in advance of an open meeting so that the public has the opportunity to review the text before a vote is taken. Before each and every item is considered by the commissioners at a public meeting the staff requests and is granted so-called "editorial privileges." Because the public does not have the text upon which the commissioners are voting, the public has no way of knowing the extent to which a draft order is actually changed – that is, the extent to which editorial privileges are exercised and for what purpose – after a vote but before the item *eventually* is released as a final order. I emphasize "eventually" in the previous sentence because, as this Committee knows, there

have been some lengthy delays in releasing orders to the public after they supposedly have been approved at open meetings. Thus, I support the provision that requires the Commission to publish each order or other action no later than 7 days after the date of adoption, or at least within some reasonably short period.

Along the same lines, I support the provision that requires the Commission to establish deadlines for Commission orders and other actions and to release promptly certain identified reports. And I support the provision in the draft bill that provides that the Commission may not rely in any order or decision on any statistical report, report to Congress, or *ex parte* communication unless the public has been afforded adequate notice and opportunity to comment. A large amount of material, including studies, articles, and reports, was "dumped" into the docket of the net neutrality proceeding only a few days before the Commission adopted a draft order citing many of these documents. This last-minute "data dump" made it difficult, if not impossible, for the public to review and comment on the new material in the docket.

New Section 13(e) requiring brief advance notice to the commissioners of an action proposed to be taken on delegated authority and allowing two or more commissioners to require that the action be brought before the full Commission makes sense. The Committee might wish to consider formalizing somewhat the objection procedure to avoid confusion. For example, Section 13(e) might be revised to provide that "2 or more Commissioners may file an objection in writing to prevent an order...."

New Section 13(l) requires the Commission to publish certain information on its website, including the total number of its full-time equivalent employees. I think this is useful information, but, as a complement, it would be useful if the Commission were

required to provide information concerning the number of contractors it retains to perform work for the Commission, for what purpose, the length of the contracts, and the material terms of the contract.

Additional Reform Recommendations for the Process Reform Act

As I said early in my testimony, the reality is, as FCC Chairman William Kennard predicted in 1999, most segments of the communications marketplace are now effectively competitive and have been so for a number of years. Indeed, when Congress passed the landmark Telecommunication Act of 1996, it anticipated the development of a competitive marketplace that would lead to less regulation. In the statute's preamble, Congress stated that it intended for the FCC to "promote competition and reduce regulation." And in the principal legislative report accompanying the 1996 Act, Congress stated its intent to provide for a "de-regulatory national policy framework." In other words, Congress understood that the development of more competition and more consumer choice should lead to reduced regulation.

But the fact is that the FCC has not done nearly enough in the 17 years since the 1996 Act's adoption to "reduce regulation" and provide a "de-regulatory" framework. Whatever the reason, the key point is that a fix is needed. As I have said, the Discussion Drafts are very commendable. But, in my view, there are a few additional reform measures that should be included in the bills to more effectively ensure that the FCC does not maintain in force existing regulations, or adopt new regulations, that are not necessary to protect consumers from harm. Enactment of these measures would require only modest changes in the Communications Act's language, and I hope the Committee

will consider including them in the bills so as to better effectuate what Congress intended to be the 1996 Act's deregulatory intent.

The **Forbearance Relief and Periodic Regulatory Review Provisions**

The 1996 Act introduced two related deregulatory tools rarely – if ever -- found in other significant statutes governing regulatory agencies. The first provision, Section 10 of the Communications Act, titled "Competition in Provision of Telecommunications Service," states the Commission "shall forbear" from enforcing any regulation or statutory provision if the agency determines, taking into account competitive market conditions, that such regulation or statutory provision is not necessary to ensure that telecommunications providers' charges and practices are reasonable, or necessary to protect consumers or the public interest. The second provision, Section 11 in the Act, titled "Regulatory Reform," requires periodic reviews of regulations so that the Commission may determine "whether any such regulation is no longer in the public interest as a result of meaningful economic competition between providers of such service." The agency is required to repeal or modify any regulation it determines to be no longer in the public interest.

While these two provisions obviously were added as tools to be used to reduce regulation in the face of developing competition, the FCC has utilized them too sparingly. In its forbearance and regulatory review rulings, the agency generally takes a very cramped view of evidence submitted concerning marketplace competition — for example, refusing to acknowledge that wireless operators compete with wireline companies by offering substitutable services, or that potential entrants exert market

discipline on existing competitors, or that present market shares are not as meaningful in a technologically dynamic, rapidly changing marketplace as they may be in a static one.

The Section 10 forbearance and Section 11 periodic review provisions can be made more effective deregulatory tools simply by adding language that requires the FCC to presume, absent clear and convincing evidence to the contrary, that the consumer protection and public interest criteria for granting regulatory relief have been satisfied. And the two regulatory relief provisions should be made applicable to all entities subject to FCC regulation, not just telecommunications providers.

This sentence could be added at the end of Section 10(a): "In making the foregoing determinations, absent clear and convincing evidence to the contrary, the Commission shall presume that enforcement of such regulation or provision is not necessary to ensure that an entity's charges or practices are not unreasonable or unreasonably discriminatory or necessary for the protection of consumers and is consistent with the public interest." Similarly, a sentence could be added to the Section 11 regulatory review provision which states: "In making the foregoing determination, absent clear and convincing evidence to the contrary, the Commission shall presume that such regulation is no longer necessary in the public interest as a result of meaningful competition between providers of such service."

The specified consumer protection and public interest criteria would not be changed. But by establishing a rebuttable evidentiary presumption, in carrying out its duties under these two provisions, only those regulations supported by clear evidence that the substantive criteria have not been met would be retained. It is possible the FCC might seek to ignore or skew evidence in order to avoid reducing regulation, but I assume the

agency's good faith in following congressional directives – and, in any event, the agency's decisions are subject to review by the courts.

Limitation on General Rulemaking Authority

Section 201(b) of the Communications Act provides that the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." This is the grant of rulemaking authority that was relied on so heavily by Justice Antonin Scalia in the recent *City of Arlington* v. *FCC* case as a reason for granting the agency such broad sway for so-called *Chevron* deference. When an agency receives *Chevron* deference upon judicial review, the agency's interpretation of its statutory authority is entitled to "controlling weight" and must be upheld unless it is unreasonable. A simple proviso could be added at the end of Section 201(b) to the effect that, before adopting a rule, "the Commission must determine, based on a showing of clear and convincing evidence presented in the rulemaking proceeding, that marketplace competition is not sufficient adequately to protect consumers from harm." This change would not prevent the Commission from adopting new regulations. Rather it would simply require the Commission to meet a higher evidentiary burden before doing so.

Sunset Requirement for Agency Regulations

Congress could add a general sunset provision to the Communications Act that provides that all rules will expire automatically after five [or X] years absent a showing by the Commission, based on clear and convincing evidence compiled after public notice and comment, that it is necessary for such rule to remain in effect to accomplish its original objective or objectives. Again, this sunset provision would not dictate that

regulations expire. Instead, it would require that the agency bear the evidentiary burden of showing that such regulations be retained.

None of these proposals I have suggested would change the substantive regulatory criteria, such as protecting consumers and the public interest, that presently are in the Communications Act. Rather in each instance they simply require the Commission to show by clear and convincing evidence that existing regulations should remain on the books or that new regulations should be adopted. I urge the Committee to consider these proposals in conjunction with the other worthwhile reform measures it is considering.

The FCC Consolidated Reporting Act

I wholeheartedly support new Section 14, the proposed Federal Communications Commission Consolidated Reporting Act of 2013. The required consolidated report would replace the myriad of existing sector and technology-specific marketplace reports that the Commission is now required to compile on a periodic basis. Consolidation of the various competition/marketplace status reports should help reduce the agency's workload somewhat because there necessarily is some inherent duplication in producing the half dozen or more separate reports. But, more importantly, the requirement to produce a consolidated report should steer the Commission away from its pronounced tendency to view the separate technology-based services as confined to their own "smokestacks" and non-competitive with each other. In today's competitive digital services environment characterized by convergence, adhering to the "smokestack" view inherently neglects marketplace realities. For example, the Commission still refuses to acknowledge the extent to which wireless services compete with wireline services, even though nearly 40% of U.S. households have abandoned landline telephone service.

The draft bill requires the Commission to assess competition in the communications marketplace, taking into account all the various services and technologies, and it specifically directs the agency "to consider the effect of intermodal competition, facilities-based competition, and competition from new and emergent communications services, including the provision of content and communications using the Internet." This requirement is especially important as part of the necessary effort to get the FCC to take a more realistic, economically rigorous, view of the extent to which competition now prevails in the communications marketplace.

Thank you for giving me the opportunity to testify today. I will be pleased to answer any questions.

Mr. WALDEN. Thank you, Mr. May. We appreciate your participation in our hearing.

We now turn to James Bradford Ramsay, who is General Counsel for the National Association of Regulatory Utility Commissioners. Mr. Ramsay, thank you for being here. We look forward to hearing from NARUC.

STATEMENT OF JAMES BRADFORD RAMSAY

Mr. RAMSAY. Thank you so much, Chairman Walden and Ranking Member Eshoo, for inviting me and giving me the privilege of testifying today.

I am enthusiastic that there is again a focus on reform at the FCC. I guess I wanted to say since I am hearing the perspective, everybody is telling where they are coming from, I am coming from the perspective of a 23-year practitioner before the agency who actually has to deal with these procedures on a daily basis, and I am representing a group of people who are directly impacted by these procedures daily: the tate public utility commissions in all 50 states, each one of your tates.

In my 23 years at NARUC, I have had the privilege of working with nine—the privilege and sometimes the frustration of working with nine different FCC chairs. I started with Al Sikes was chair, and of course, I am here for Mignon Clyburn, my really good friend. And without exception, I think they have all been dedicated public servants, really trying to do what they thought was in the best interest of the country. Mignon, when she came up here, Chairman Clyburn when she came up here before her confirmation as FCC chair, I was talking to her at the NARUC offices, and she just looked up, and we were talking about the confirmation hearing process. She said no, I don't really care about all this, Brad, I just want to do the right thing. And I think that is what all FCC Commissioners try to do. I think the staff over at the FCC is among the most professional and hardworking of all of the federal agencies that I deal with here in Washington, but that doesn't mean that there aren't process abuses at the FCC, and the process abuses, it also doesn't mean that Congress shouldn't be looking at some ways to correct the process abuses at the FCC. There have been process abuses at the FCC every year that I practiced before the agency before both Democratic and Republican Administrations. There have been problems, problems that unnecessarily increase cost to taxpayers—that is your constituents—problems that increase the regulatory risk unnecessarily for FCC policy pronouncements to be overturned on process issues that we shouldn't even be talking about, problems that directly undermine rationale decision making. I mean, if you look at some of the provisions in this bill, they are designed to make sure that the other FCC Commissioners have adequate time to look at the record and consider things that are put in the record later in the process before they make their decision. Those provisions I think are useful.

There are also problems I think that the discussion draft will actually go a long way towards correcting, or at least certain provisions in the discussion draft. Is that draft perfect? There is no such thing as a perfect piece of legislation coming out of Congress, but there are some pieces and, you know, NARUC endorses very spe-

cifically certain aspects of this legislation. It provides a good framework from NARUC's perspective for bipartisan action going forward at FCC that are in there that are supported by both sides.

I think it is worth pointing out here that like the committee and Congress, NARUC is bipartisan. The people that I represent, unlike the other witnesses on this panel, are in-state experts whose interests align precisely with each representative in this room. These are commissioners that reside and work in your state, and there is not another stakeholder in the telecommunications sector that cares more about what happens to the infrastructure in your state and to the services and your state and the impact that the FCC decisions have on that than the people that I represent, and there are also few people that have the same level of appreciation of what that impact means and the expertise to provide input. I think it is significant that those same commissioners from your states have for years, almost a decade now, supported many of the specific provisions that we endorse in this discussion draft, and when I look at process reform, there are so many reasons that you should be considering this carefully. One of them is that if you fix it so that the record is better, if you put in these provisions, my belief is, publishing the rule ahead of time, making sure there is an opportunity to reply to late ex parte filings and studies that have been in the record fairly close before the deadline for advocacy drops, if you give an opportunity for people to respond to these, if you give the Commissioners more time to consider things that they are given, then you will get a better decision and you will get a better decision because there is a better record. If you don't put in some of these requirements, and I will mention just three of them, the rule to publish the text of the rule in advance, to require minimum comment cycles, which is crucial for state commissions because we have limited resources and we can't act as fast as others can, and to effectively require time for reasonable consideration of the ex partes, if just those three requirements, you get a better record. If you don't do those requirements, the people that get disadvantaged are the people that I represent and small businesses in your states and the consumer advocates in your states. We are the ones that don't have the resources and can't respond quickly. But no one benefits if we all end up in court arguing about process instead of policy.

I can see my time is running down here, but I will just say, if you look in my testimony, I point out, I am litigating right now in the 10th Circuit over a decision that came from this Administration. There are examples from all the Administrations of process problems. There I think we have a reasonable chance of coming back, bringing the entire reformation of the federal university service regime accomplished by the agency in 2011 back to the agency just on process issues, and if those provisions that I mentioned had been enacted into law at the beginning of 2011, I wouldn't be litigating those issues today.

So I think the bill provides a useful vehicle, and I encourage you to seize the opportunity to move forward with reform. Thank you very much.

[The prepared statement of Mr. Ramsay follows:]

Testimony on behalf of the
National Association of Regulatory Utility Commissioners
(NARUC)

by

James Bradford Ramsay
NARUC GENERAL COUNSEL

before the

United States House of Representatives
Energy and Commerce Committee
Subcommittee on Communications and Technology

hearing on

Reforming Federal Communications Commission Process

July 11, 2013

National Association of Regulatory Utility Commissioners
1101 Vermont Ave, N.W., Suite 200
Washington, D.C. 20005
Telephone (202) 898-2207, Facsimile (202) 898-2213
Internet Home Page http://www.naruc.org

Chairman Walden, Ranking Member Eshoo, and members of the Committee, thank you for the opportunity to testify today on Federal Communications Commission (FCC) Process Reform.

I am Brad Ramsay, the General Counsel of the National Association of Regulatory Utility Commissioners (NARUC). It is – like Congress – a bipartisan organization. NARUC's members include public utility commissions in all your States, the District of Columbia and U.S. territories with jurisdiction over telecommunications, electricity, natural gas, water and other utilities. The people I represent are the in-State experts on the impact of FCC regulation in your State and on your constituents. They, like you, worry about the impact of FCC initiatives on your constituents. I have spent the last 20 plus years representing NARUC on, among other things, telecommunications issues. I spend a great deal of time at the FCC. I am staff to every joint board and conference and support several NARUC commissioners serving on several FCC federal advisory committees.

Let me began by sincerely thanking you for circulating the discussion draft and holding this hearing. There is no question that reform is needed.

During my 23 years at NARUC, I've had the privilege of working with nine FCC chairs spanning both Republican and Democratic Administrations.[1] From Al Sikes up to the current chair Mignon Clyburn, without exception, they have all been dedicated public servants doing their best to act in the best interest of the country. I also genuinely believe,

[1] Mignon Clyburn (D) (May 2013 – present), Julius Genachowski (D) (June, 2009 - May, 2013), Michael J. Copps (D) (January 20, 2009 - June, 2009), Kevin J. Martin (R) (March 18, 2005 - January 19, 2009), Michael K. Powell (R) (January 22, 2001 - March 17, 2005), William (Bill) E. Kennard (D) (November 3, 1997 - January 19, 2001), Reed E. Hundt (D) (November 29, 1993 - November 3, 1997), James (Jim) H. Quello (D) (February 5, 1993 - November 28, 1993, and Alfred C. Sikes (R) (August 8, 1989 - January 19, 1993).

that staff of the FCC is among the hardest working and most professional group of federal employees in the country.

Still procedural lapses unquestionably occur.[2] Unfortunately, when that happens, those with limited resources, e.g., small businesses, State commissions, consumers, and consumer advocates, are disproportionately disadvantaged.

Process issues at the FCC are not specific to one party or administration. Both Republican and Democratic FCC Chairs have instituted positive reforms that improved the transparency and fairness of FCC procedures. But both have also, at times, proceeded in a way that undermined both the fairness and transparency of those same procedures. For example, Chairman Genachowski started the practice of publicly announcing draft orders that would be considered at FCC open meeting two weeks before Sunshine restrictions cut off advocacy.[3] On the other side of the aisle, Chairman Martin started publishing a list of pending items "on circulation" among the Commissioners for approval outside of public meetings.[4] Both of these are useful reforms.

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[2] *See Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (finding FCC ex parte contacts violated basic fairness which requires rulemakings to be carried on in the open and ordering the proceeding reopened); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (extending the doctrine of *Sangamon Valley*, *id.* at 51-59, while recognizing that "informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate *so long as they do not frustrate judicial review or raise serious concerns of fairness*," *id.* at 57 (emphasis added)).

[3] Chairman Genachowski also, among other things, moved through a well-intentioned revision to improve the FCC *ex parte* rules. However, it is far from clear that those changes have fixed the process. The Consumer Federation of America's Mark Cooper, who testified before this Committee on FCC reform in 2011, was not far from the mark when he characterized the process as "an abomination" that has "become an unofficial and abusive backdoor process of negotiation."

[4] FCC Press Release (December 4, 2007) FCC PUBLISHES LIST OF ITEMS ON CIRCULATION Washington, DC – The [FCC] announced that beginning today, it would publish on its public website a list of FCC Items on Circulation. On Friday, November 30, FCC Chairman Kevin Martin informed Congress of his intent to take steps to ensure equal access to

NARUC has not taken a position on all aspects of the draft legislation. However, there is no question many of the process reforms suggested in this bill will help level the playing field by significantly increasing transparency and guarantee the FCC compiles a better record for decisions. NARUC has generally endorsed several of the improvements suggested in the draft. In fact, we believe the bill should offer a few more simple reforms. Nonetheless, this draft provides a good starting point for a bipartisan bill that could pass in this Congress. NARUC will help any way we can.

As one respected law professor put it in 2009:

> For years, the agency tolerated a level of mystery and secrecy over what proposals would be submitted for consideration, an extraordinary reliance on the *ex parte* process at the expense of the formal notice-and-comment procedure, and a limited degree of collegial discussion among the Commissioners and the public. Of late, however, concerns about how the agency operates have become more pronounced and Congress has finally taken an interest in the question of … how to reform the FCC's institutional processes.[5]

Most would concede that the agency has made considerable progress since that time, but several of the organic changes the draft proposes to the FCC's enabling statute will assure there is no backsliding and others further improve the agencies procedures.

If Congress is only able to pass the provisions NARUC has endorsed, that alone will result in a more transparent and efficient process, and ultimately better and more informed decisions more likely to be upheld on review. That, in turn, can only result in

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information, particularly in regard to the disclosure of information about proposed rules that are scheduled to be considered by the Commission. . . .[the change] is intended to make the FCC's rulemaking process as fair and transparent as possible.

[5] See, Weiser, Philip J., *FCC Reform and the Future of Telecommunications Policy,* at 1, (January 5, 2009), ("*FCC Reform*") available at: http://fcc-reform.org/f/fccref/weiser-20090105.pdf. Professor Weiser was tapped by the Obama Administration to work on, *inter alia*, smart grid policy issues for the White House. Earlier this month, he left the White House to return to the University of Colorado at Boulder as its dean.

better oversight, more competition, and new and improved services and service quality for consumers.

NARUC has well-established positions on several of the proposals. This testimony attempts to take them in the order they appear in the draft.

PROPOSED RULE MAKING REQUIREMENTS[6]

Many agency observers, including NARUC,[7] have long recognized the problems with the FCC's rulemakings. Professor Weiser, in the earlier cited *FCC Reform* article, at 16-17, explained the problem this way:

> In terms of the use of rulemaking proceedings, the FCC has gotten into the habit of commencing wide-open rulemakings that do not propose specific rules and leave parties with the challenge of guessing what issues are really important—or reserving their energies and resources until the *ex parte* process when that might become clear. Technically speaking, this practice does not violate the Administrative Procedure Act, as that law only specifies that NPRMs must include "a description of the subjects or issues involved."[] Practically speaking, however, this practice undermines the opportunity for meaningful participation and effective deliberation. {footnote omitted}

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[6] Congress may wish to consider, in this context, that the FCC often issues orders in non-rulemaking proceedings that have broad applicability. The agency's rules recognize the fairness issues – and the opportunities for creating a better record for decisions in a note to 47 C.F.R. § 1.1208 stating: in such cases "the Commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding will be conducted in accordance with the provisions of § 1.1206 governing permit-but-disclose proceedings."

[7] See *December 12, 2008 Letter from NARUC President Butler to Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6, available online at: http://www.naruc.org/Testimony/08%200916%20NARUC%20House%20ltr%20Prepaid%20Calling%20Card%20fin.pdf. ("Publish the specific language of proposed regulations with a proposed rationale and facts to support the action taken, seek public comment on the proposal and provide AT LEAST 30 days for agency consideration. This ***revives*** an earlier FCC practice of publishing a "Tentative Decision" prior to the adoption of final rules. The benefits are obvious. *The FCC frequently releases vague Notices of Proposed Rulemaking that fail to articulate proposed rules and read more like Notices of Inquiry by posing countless open-ended questions*.")

Section 13(a) (1) (B) suggests the correct solution – one specifically endorsed by NARUC as early as 2008: the FCC must include the specific language of the proposed rule or modification.

This, in turn, logically requires there also be "certain prior" proceedings.[8]

Some praise former Chairman Genachowski for increasing the instances in which the text of a proposed rule was put out for comment before adoption to 85%, as compared to 38% in prior administrations. That praise is deserved. The question that naturally arises is – why would it not be better to make that number 100% as this section of the draft legislation effectively requires. Currently, NARUC, the National Association of State Consumer Advocates and others, as well as the FCC, are wasting taxpayer and scarce staff resources in the 10th Circuit Court of Appeals arguing over process issues associated with the FCC's November 2011 Universal Service Reform decision – some that could not have occurred if this requirement and the draft's minimum 30 day comment cycles had been in effect.[9] There are, of course, also many substantive policy issues involved in the appeal, but there is a good chance that a remand could occur on process issues. This is not an effective use of anyone's resources. Disagreements should be focused on substance – not on whether the process provided a fair opportunity to

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[8] NARUC has not taken a position on whether performance measures should be included in any final rulemaking that imposes a burden on consumers or industry – but, on its face, such a proposal would require the agency to focus on the actual impact of any proposed rule and determine if it is likely to have a beneficial impact.

[9] In the same proceeding, the FCC set truncated comment cycles (of 21 and 14 days) on a broad notice shortly before the final order was adopted. Routinely, on complex items, the agency sets 30 and 45-day comment cycles at least to provide commenters adequate time to digest and respond on the complex issues involved. Despite the volume and complexity of issues involved in the Universal Service/Intercarrier Compensation Reform docket, the FCC set a shorter comment cycle. Such shorter time periods are more prejudicial to those with fewer resources than industry, such as States, consumer groups and others.

assure the record reflects all information needed for FCC Commissioners to make an informed decision.

Significantly, the draft also requires a minimum of 30 days for stakeholder to comment on a proposal and 30 days to reply to others comments. Though it will require the FCC to manage its proceedings more carefully, this is a crucial improvement over the current process. Under the current rules, NARUC's State member commissions – *who often are among the best positioned to provide useful and relevant input* - cannot get comments drafted and approved in time to make shorter deadlines. By establishing a minimum 30 day comment time frame, Congress would be tilting the FCC process in favor of better and more complete records. Shortchanging the development of the record can only lead to less informed decisions.

Statutory deadlines make it easier – not more difficult - to plan comment cycles. The only time problems might arise is when the FCC wishes to base its decision on some late filed submission or report – which because of a looming statutory deadline has not been subject to in-depth critiques by other interested stakeholders.

This is not a hypothetical concern. In several forbearance proceedings, petitioners filed data that purportedly supports their petitions very close to the statutory deadline. Such action effectively eliminated the opportunity for any opposition or real analysis. Indeed, NARUC passed a resolution in 2008 seeking revisions to the FCC's existing forbearance procedures to assure that States have a realistic opportunity to participate and

comment on data provided in such circumstances.[10] The FCC has taken steps to "fix" the forbearance comment cycle, but that has not fixed the problem in other contexts.

For example, in the proceedings that lead to the FCC's November 2011 Universal Service and Intercarrier compensation reform order, the record was inundated the record with *ex parte* submissions up to, and on, the Sunshine blackout date of October 21.[11] Indeed, the FCC inserted over 100 items into the record shortly before that date.[12] The agency adopted the order just seven days later on October 27th. It was impossible for stakeholders to provide any meaningful response to these last minute submissions. The provision in 13(f) directly addresses this problem. It states that the FCC cannot "rely, in

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[10] To address this problem, NARUC asked the FCC to require forbearance petitioners to file "complete" petitions before the statutory shot clock starts. This will help ensure that all parties have a fair opportunity to thoroughly review and present their views to the Commission.

[11] The FCC's Electronic Comment Filing System (ECFS) includes no less than 775 substantive ex parte contact disclosures from July 29 to October 21, 2011 alone. A number of these "permit but disclose" ex parte contacts and submissions involved the discussion of quantitative data and analyses. Some of these were submitted on a confidential basis with only redacted versions of the filings available in the public domain.

[12] On October 7, 2011, two weeks before the start of the Sunshine period, and again on October 17 and 19 (two days before the deadline), the agency began inundating the record with lists of academic reports and published articles, studies, position papers, analyses, statistics, newspaper articles, white papers, publications, handbooks, state laws, state regulatory pleadings and decisions, reference works, industry surveys, treatises, congressional reports, and correspondence to the FCC. Staff described them as "publically available information it may consider as part of this proceeding." *See* http://apps.fcc.gov/ecfs/document/view?id=7021713537 (Oct. 7, 2011) (35 items and "a description of the basic statistical methods used for developing the updated corporate operations expense limitation formula that was presented in our prior Public Notice"); http://apps.fcc.gov/ecfs/document/view?id=7021714787 (Oct. 17, 2011) (63 items); and http://apps.fcc.gov/ecfs/document/view?id=7021715588 (Oct. 19, 2011) (16 items and "a summary of staff analysis of areas where mobile service is available only from a small or regional provider receiving high-cost support"). The FCC relied on these "publically available sources" to determine that the "bill and keep" ($0 rate) intercarrier compensation regime (a lynchpin of the FCC's "reform" effort) was allegedly "less burdensome" and "consistent with cost causation principles." *FCC November 18, 2011 Transformational Order at* ¶¶ 742-743 and n. 1295-1296; ¶ 744 and n. 1304, 26 FCC Rcd. 17905-06. This crucial decision is based in part on this collection of materials submitted days before the record closes – forestalling any real opportunity of a reasoned critique/response.

any order, decision, report, or action, on— (A) a statistical report or report to Congress, unless the Commission has made such report available for comment for 30-days period prior to adoption...or (B) an ex parte communication or any filing with the Commission, unless the public has been afforded adequate notice of and opportunity to respond to such communication or filing, in accordance with procedures to be established by the Commission by rule.

Emergencies do, however, arise where there is no time for either extended notice or comments. The FCC should retain some authority to act in exigent circumstances.[13]

Finally, Section 13(a) requires that for rules which may have an economically significant impact, the FCC must include three things in its order (i) "an identification and analysis of the specific market failure, actual consumer harm, burden of existing regulation, or failure of public institutions that warrants the adoption or amendment," (ii) a "reasoned determination the benefit of the rule justify the cost, taking into account alternative forms of regulation taking into consideration the need to tailor regulation to impose the least burden on society"; and (iii) include "a reasoned determination that market forces or changes in technology are unlikely to resolve within a reasonable period of time the specific market failure, actual consumer harm, burden of existing regulation, or failure of public institutions."

NARUC has not taken any position on these three interrelated analytical requirements. However, all regulations impose some costs,[14] and some type of weighing

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[13] Presumably the FCC would retain the authority in 5 U.S.C. § 553(b) (3) (B) to omit notice and public procedures "when the agency for good cause finds" it is "impracticable, unnecessary, or contrary to the public interest." See 5 U.S.C. § 553(b) (3) (B), online at: http://www.archives.gov/federal-register/laws/administrative-procedure/553.html. But some clarification might be useful.

of the relative costs and consumer benefits is the *sine qua non* of both agency oversight and reasoned decision making currently. Such an approach, has been supported by all of our recent Presidents via various Executive Orders[15] – albeit focused on Executive agencies - the most recent released by the current Administration in January 2011.[16]

The focus on technology in 13(a)(iii) seems at best unnecessary. Regulators should take a technology neutral or functional approach to oversight of any market sector. Regulatory policy should not favor one technology over another. Markets should be the

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[14] On April 1, 2011, the Office of Management and Budget announced its 14th annual Report to Congress on the Benefits and Costs of Federal Regulations at 76 Federal Register 18260 (April 1, 2011) - online at: http://edocket.access.gpo.gov/2011/pdf/2011-7504.pdf. The document does a cost-benefits analysis and claims regulatory benefits between $136 and $651 billion and total costs of $44 to $62 billion. A draft of the report is available at: http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/. Other estimates of the cost side are higher. See, e.g., *The Impact of Regulatory Costs on Small Firms* by Nicole V. Crain and W. Mark Crain Lafayette College Easton, PA (September 2010) developed under a contract with the Small Business Administration, Office of Advocacy, available online at: http://archive.sba.gov/advo/research/rs371tot.pdf , which claims the annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008.

[15] See, e.g., Executive Order No. 12291, 3 C.F.R. 127 (1982) (Reagan's executive order requiring the benefits of regulation to outweigh the costs); Executive Order No. 12498, 50 C.F.R. 1036 (1985) (Reagan's executive order requiring OMB review of all new regulations); Exec. Order No. 12866, 3 C.F.R. 638 (1994) (Clinton's executive order requiring regulatory review and agency determination that regulatory benefits justify its costs). President George W. Bush issued Executive Order 13,422, 72 Federal Register 2763 (January 23, 2007) amending Executive Order 12,866, which, *inter alia*, required agencies to "identify in writing the specific market failure (such as externalities, market power, or lack of information) or other specific problem that it intends to address..to enable assessment of whether any new regulation is warranted."), available online at: http://edocket.access.gpo.gov/2007/pdf/07-293.pdf.

[16] See, Executive Order 13563, *Improving Regulation and Regulatory Review* (January 18, 2011) , published at 76 Federal Register 3821 (January 21, 2011), (Obama's order specifically notes "each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives. . ."). This order is also available online at: http://edocket.access.gpo.gov/2011/pdf/2011-1385.pdf.

arbiter of what technology wins industry and consumer support. Indeed, technology is only relevant to the extent it impacts market power and/or concentration. The reasons for regulation never change – either the regulator is a surrogate for absent market forces or an enforcer of (i) market facilitations – like local number portability- that enhance competition or (ii) public interest requirements that the market will not recognize or will actively oppose. Experience suggests consumers concerns about quality of service, service reliability and fair billing practices remain regardless of the technology used to provide their services.

COMMISSIONER COLLABORATION

Sections 13 (b), (c) and (d), of the draft all cover necessary pre-requisites for efficient Commissioner interactions.

Section 13(b) contains a series of measures that assure the Chairman of the agency cannot disadvantage or withhold critical information from his/her fellow commissioners. NARUC has specifically endorsed giving FCC Commissioners a minimum of 30 days to review the record of a proposed rulemaking or order. This is consistent with the Draft's twin requirements to assure all FCC Commissioners have adequate time to review a proposed rulemaking, including the actual text of a draft order, as well as knowledge of options available to resolve a particular proceeding.

No one can expect any Commissioner to do their sworn duty without adequate time to review proposed orders and the records that supports them. This *should* not be an

issue. However, whether accurately or not, the Chairs of the FCC,[17] as well as other agencies,[18] have – from time to time – been accused of using process to limit information about particular proceedings and/or otherwise prevent other commissioners from effectively fulfilling their statutory responsibilities. The Section 13(b) requirements should diminish these concerns.

Section 13(c) is a modified version of standalone bipartisan legislation sponsored by Representatives Eshoo, Shimkus and Doyle - the ***FCC Collaboration Act (H.R. 539)*** and supported by NARUC. NARUC has supported some of the concepts incorporated in this section of the draft since 2004.[19] This section of the Draft corrects systemic problems with the so-called "Sunshine laws" that induce significant inefficiencies and delay in FCC administrative process.

In a December 12, 2008 Letter to Obama's Transition Team,[20] NARUC urged the Administration to press for substantial and broad modification of the so-called Sunshine rules that are the focus of this section. Specifically, there, among a laundry list of other much needed FCC reforms, NARUC argued:

> **Efficiency – Sunshine Rules:** ***Drop the Artifice and require face-to-face Commissioner Negotiations . . .*** *lift the sunshine rules for face-to-face FCC commissioner negotiations.* The current "Sunshine rules" do not

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[17] See, e.g., *Committee on Energy and Commerce Majority Staff Report, Deception and Distrust: The Federal Communications Commission Under Chairman Martin* (December 2008).

[18] Compare, e.g., *Memorandum to NRC Chairman Jaczko from Hubert T. Bell, NRC Inspector General on the NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository Lincense Application* (OIG Case No. 11-05) (June 6, 2011), addressing, *inter alia*, concerns about whether the Chairman's "control of information prevents the other commissioners from effectively fulfilling their statutory responsibility to address policy matters."

[19] See *Resolution on Federal Restrictions Affecting FCC Commissioner Participation on Joint Boards* (March 10, 2004), at: http://www.naruc.org/Resolutions/participation_jointboards04.pdf.

[20] See *December 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6.

> prevent decisions from being made out of the sunshine of public scrutiny. The Commissioners decide and usually have their dissents and concurrences prepared before the public meetings - which is more often a stylized Kabuki theatre rather than an actual decision-making session. The Sunshine rules simply put more authority in the hands of expert staff and drags out the negotiation process. This is horrifically inefficient.

As long as any formal vote occurs in an open meeting, the discussion draft allows negotiations among principals (the FCC Commissioners) – not just their delegates. This is a significant and much needed improvement to the current process and we support it.

But the Discussion draft also deftly handles a related problem that arises in the context of Joint Board and Joint Conference deliberations.

To take advantage of the expertise and insight of State Commissioners on certain key issues, Congress requires joint FCC-State deliberative bodies. These so-called "joint boards," charged by Congress with the responsibilities of a federal administrative law judge and tasked with making critical record-based recommendations on universal service,[21] advanced services,[22] and separations[23] issues, *also have FCC Commissioners as*

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[21] The FCC Federal State Joint Board on Universal Service was established in March 1996 as per the Congressional mandate found in 47 U.S.C. § 254 (1996) (The text of the law is available from the Government Printing Office website at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+47USC254. The FCC webpage on this Board is at: http://www.fcc.gov/wcb/tapd/universal_service/JointBoard/welcome.html.

[22] The FCC Federal State Joint Conference on Advanced Services was established in 1999 as part of the FCC's effort to promote deployment of high speed services, pursuant to 47 U.S.C. § 157 (Note incorporates § 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended by Pub. L. 107-110, Title X, § 1076(GG), Jan.8, 2002, 115 Stat. 2093), available at page 32 of the 2007 House edition of Title 47 of the United States Code, online at: http://uscode.house.gov/pdf/2007/2007usc47.pdf. The FCC webpage on Joint Conference on Advanced Services activity is at: http://www.fcc.gov/jointconference/headlines.html. Congress authorized its creation in 47 U.S.C. § 410(b) (1994), found online at page 220 of Title 47 referenced *supra*.

[23] The FCC Federal State Joint Board on Separations has been in operation for over 25 years. Congress authorized its creation in the 1970s in 47 U.S.C. § 410(c) (1994), found at page 220 of the copy of Title 47 found at the web address in note 3, *supra*. The FCC webpage on the Separations Joint Boards is at: http://www.fcc.gov/wcb/tapd/sep/welcome.html.

participants. Necessarily, the incredible inefficiencies in deliberations imposed by the current law on full commission deliberations also plague the work of these Congressionally-mandated bodies. A typical joint board has four State public service Commissioners, nominated by NARUC and confirmed by the FCC, and three FCC Commissioners.

Currently, FCC Commissioners must rotate their participation during face-to-face meetings and conference calls of such Joint Boards, causing continuous inefficient repetition of prior conversations and positions. This is another area where there is bipartisan consensus that the Statute should be changed. At your FCC oversight hearing in 2011 the Draft's proposed sunshine amendments - particularly with respect to Joint Boards and Conferences, was the focus of Commissioner Clyburn's testimony, endorsed by the other FCC Commissioners and discussed at length during the question and answer period.[24] Sunshine reform – either as a standalone measure or part of a broader proposal like this discussion draft is long overdue. This section unquestionably streamlines the FCC's decisional procedures. Its requirement for party diversity for a quorum to meet is a critical and clever additional protection of process. NARUC does have one recommendation to improve this section. We respectfully request that "or conference" be added in after the two "joint board" references in (c)(1)(B) of the discussion draft This will ensure that the Joint Conference on Advanced Services is on equal footing with the Joint Boards on Universal Service and Separations. NARUC urges Congress to move quickly to reform this aspect of Commission operations with our suggested edit.

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[24] Testimony of FCC Commissioner Mignon Clyburn before the House Subcommittee on Communications and Technology, (May 13, 2011), available online at: http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/051311/Clyburn.pdf

Several years ago, three FCC Commissioners (bipartisan) combined to override then Chairman Powell's Triennial Review Order. In this unusual circumstance, then Chairman Powell did allow the majority to direct the staff to draft the decision for review by the full Commission. NARUC supported that process. Section 13(d) of the draft requires the FCC to establish specific procedures for how the FCC will handle this circumstance in the future. Having such rules in place should be welcomed by FCC staff as a clear guide for their fiduciary responsibilities in such circumstances and should streamline the process the next time this circumstance arises.

Transparency and Assuring FCC Action in Pending Proceedings

The next four sections – (f), (g) (h) and (i) all are laudable procedural vehicles to (1) assure that orders do not languish at the agency and (2) allow all Stakeholders to know when matters in which they have an interest are likely to come up for decision. NARUC has again, specifically endorsed many of these suggestions.

Indeed, in the earlier referenced December 2008 letter to the Obama Transition team, NARUC specified that:

> The FCC should set deadlines on each type of filing where no statutory deadline exists - including complaints - but particularly rehearing requests and remands which have a tendency to languish at the FCC). The FCC should avoid non-decisional releases on statutory (or agency set) deadlines for action – like the requirement to "act" on USF Joint Board recommended decisions within one year.

Setting some deadlines for each type of proceeding by rule is a good idea – as the Draft specifies in Section 13(h). But the draft goes further. It also includes provisions that ratchet up pressure for the FCC to meet those deadlines in 13(i) by

requiring it to report to Congress on success with meeting deadline and the associated requirements in Section 13(f). NARUC supports this concept because it results in public reports showing the current status of all pending items in 13(g), which will allow interested parties to know--including items on circulation--whether Commissioners have taken a vote on an order, decision, report, or action that has been pending review for more than 60 days. This last requirement only puts some pressure on the FCC to act on circulated items, but it also "gives interested parties notice that some action in a particular docket is imminent."[25]

NARUC also specifically endorsed requiring the FCC to release decisions within a set time after the last Commissioner votes on the item. We did, however, suggest a slightly longer time frame – 30 days.

The draft also includes a requirement in 13(n) that the FCC to create a searchable online database of consumer complaints to help consumers choose among competing providers and services. NARUC adopted a resolution in February 2012 explicitly finding such a database will be a useful tool for consumers.[26] The resolution endorses legislation to require the FCC to create an online publicly available searchable database of consumer service complaints that allows users to compare competing companies/services as soon as possible. For competition to flourish consumers need access to information that will help them make informed decisions. A comprehensive searchable database on consumer complaints will provide just that.

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[25] *See December 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6.

[26] *See* Resolution Regarding the Federal Communications Commission's Complaint Procedures, adopted February 8, 2012 and available online at: http://www.naruc.org/Resolutions/Resolution%20on%20FCC%20Consumer%20Complain%20Procedure.pdf

I have, as requested, focused this testimony on the *Discussion Draft* and referenced NARUC's explicit support for a number of provisions and its implied support for others. There are, however, in NARUC's view, other issues Congress should address as part of any reform proposal.

One of the more obvious is embodied in the recently introduced bipartisan *FCC Commissioners' Technical Resource Enhancement Act* (H.R. 2102) from last Congress. The bill allows each FCC Commissioner to appoint to its staff an engineer or computer science professional to provide expert counsel on technical matters before the agency. NARUC passed a resolution on this precise point in February 2009, which, among other things, points out that proposed rulemakings and orders have demonstrated that the Commission needs enhanced capabilities in certain functions such as finance and engineering.

Regarding the consolidated reporting bill, NARUC hasn't taken a position but we do have some general thoughts at least on broadband-related reporting obligations. Former FCC Chairman Kennard, recognizing the crucial importance of State input, created the Federal-State Joint Conference on Advanced Services to aid the FCC in collecting and analyzing data on broadband deployment, availability and adoption. It is a tool that has been underutilized by the commission. Many States have policies and are experimenting with programs to improve broadband reach and adoption. At least four States have universal service funds that specifically support broadband infrastructure. Every State has the incentive to improve the level and quality of services offered to your constituents. States can be powerful partners in the drive for ubiquitous broadband deployment and adoption. Historically, State experimentation, both good and bad, has

guided federal policy and the Joint Conference is well positioned to provide insight on how issues can be addressed.

NARUC and its members are committed to working with this Subcommittee, Acting Chairwoman Clyburn and her successor once they are confirmed to improve process and procedure at the FCC. Again, if this subcommittee and Congress were just to enact the provisions specifically endorsed by NARUC the processes at the FCC would be vastly improved. Thank you again for inviting me to testify and I would be happy to answer any questions the committee may have.

Mr. WALDEN. Mr. Ramsay, thank you very much for your helpful comments. We appreciate that.

We will turn now to Mr. Stuart M. Benjamin, Douglas B. Maggs, Chair in Law and Associate Dean for Research at Duke Law. Mr. Benjamin, thank you for being here.

STATEMENT OF STUART BENJAMIN

Mr. BENJAMIN. Thank you, Chairman Walden, Ranking Member Eshoo, members of the subcommittee. Thank you for the opportunity to testify today.

My academic career has centered around the FCC. I teach telecommunications law, I coauthor a telecommunications law casebook, and I teach and write in administrative law and the First Amendment. From 2009 to 2011, I was the inaugural Distinguished Scholar at the FCC, and I thank co-panelist Rob McDowell for coming up with that job title for me. True story.

So I should also say I have no clients, paid or unpaid, nor have I had any clients or consulting relationships since I became an academic in 1997. All right.

I think I understand the concerns that motivate the FCC Process Reform Act, and I think there are quite legitimate questions about FCC processes and standards. I do have concerns about the bill as drafted, though, for several reasons. First, as has already been touched on, the bill contains many new requirements that are unique and would bring the FCC into uncharted territory. So there are neither agency nor judicial precedents that would provide guidance and clarity, and these new requirements could be the subject of litigation; that is to say, one could bring a lawsuit based on them. For instance, in addition now to being able to challenge a rule as arbitrary and capricious, which one is already able to do, one can challenge the adequacy of any or all of the new findings required. My concern is, this runs the risk of the bill being a jobs program for lawyers. If I were in private practice in D.C., that might be great. As a citizen, I am not sure that it is so great.

And then this uncertainty created by new provisions is exacerbated by the fact that the provisions apply only to the FCC, and that brings me to the second concern which is, as Dick Pierce has pointed out, the great strength of the Administrative Procedure Act is that it applies the same rules to all agencies allowing for consistency and fairness, and this bill would undermine that consistency by creating a special set of rules for the FCC. My own view is, if the bill's proposals are good ideas, I think they are worth applying across the board. If they are not worth applying across the board, I am not sure why they should apply only to the FCC.

The third concern I want to raise involves merger review. As I detail in my written testimony, the requirement of narrow tailoring—narrow tailoring is not found in the U.S. Code, it is found only in strict judicial scrutiny—and the requirement of uniqueness of harms will, I think, make it difficult, if not impossible for the FCC to impose any meaningful merger conditions. If Congress's goal is to eliminate the FCC's merger review, my suggestion would be, you should simply repeal the FCC's merger authority. That would save everyone—companies, citizens, FCC staff—a huge amount of time, energy, and money. If, on the other hand, Congress

wants the FCC to play a meaningful role in merger review, I think the legislation should use somewhat less forbidding language than this stark language of strict scrutiny.

My fourth reservation arises out of provisions that would diminish the chairman's authority. This is something I got great insight into when I was at the FCC. In my time there, I came to recognize the great value arising out of the clarity of lines of authority, of having a clear hierarchy, and reducing the chairman's authority would undermine that clarity, potentially creating confusion and inefficiency within the FCC. I understand the arguments for allowing, for instance, a majority of the Commissioners to place an item on the agenda. One thing that particularly jumped out at me was a proposal to empower a minority of commissioners to block actions taken under dedicated authority. I think that is a different matter. The Commission makes thousands of decisions every year, and businesses and individuals rely on the predictability and speed of the FCC's decision-making process in resolving those matters. So changing that process may unsettle a lot of reasonable expectations.

Fifth and finally, the bill creates additional procedures that I fear will confer little, if any, benefit. Notices of inquiry, which of course don't appear anywhere in the APA and only one provision of the United States Code, sometimes make sense, and the Commission sometimes uses them, but requiring notices of inquiry will further ossify the rulemaking process, and I think the same is true of the requirement that proposed rules be issued with a notice of proposed rulemaking. The Commission already sometimes or often puts out proposed rules with its notices of proposed rulemaking, but requiring them, I think, adds cost and very uncertain benefit. And it will push rulemaking even more into a rule-adopting process in which all the important decisions are made before the APA process even starts. That is to say, the danger is that the APA process becomes kabuki theater and public comments arrive after all the meaningful decisions have been made. So the concern is, in general these provisions will not make the FCC regulation better, just more laborious.

I see that my time is up so I will stop there.

[The prepared statement of Mr. Benjamin follows:]

STUART MINOR BENJAMIN
DOUGLAS M. MAGGS PROFESSOR OF LAW
DUKE LAW SCHOOL

Before the
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
of the
UNITED STATES HOUSE OF REPRESENTATIVES

on the
FEDERAL COMMUNICATIONS COMMISSION PROCESS REFORM ACT OF 2013
July 11, 2013

Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, thank you for the opportunity to testify before you today on the Federal Communications Commission Process Reform Act of 2013.

My academic career has in many ways revolved around the Commission and its processes. My core research and teaching areas are telecommunications law, administrative law, and the First Amendment. I have written many law review articles on these topics and am the coauthor of Telecommunications Law and Policy, a legal casebook now in its third edition. From 2009 to 2011 I was the inaugural Distinguished Scholar at the Commission. I should add that I am not being compensated for my testimony in any way, either directly or indirectly. I have no clients (paid or unpaid), nor have I had any clients or consulting relationships since I became an academic in 1997.

Let me begin with the big picture. I share many of the concerns that appear to underlie these bills. I favor changes to agencies' processes in line with some of the provisions in the bills. With respect to the FCC specifically, I am particularly sympathetic to the streamlining of reports

contained in the companion bill, the Federal Communications Commission Consolidated Reporting Act of 2013. That said, I have some reservations about the Process Reform Act ("bill") as currently drafted, which I discuss below.

Specificity to the FCC

Perhaps the most obvious question that the bill raises is why, if the reforms are good ones, they are limited to the FCC. One of the great advantages of the Administrative Procedure Act ("APA") is that it applies the same rules to all agencies, allowing agencies to learn from each other and leading to the development of a jurisprudence that applies to all agencies. The goals underlying many provisions of the bill would seem to apply with equal force to all agencies, and there is no obvious reason why these provisions should be limited to the FCC. Applying them only to the FCC moves away from the APA's valuable unification of agency procedures and standards.

In this regard, let me highlight the provision in the bill that I most strongly support. Section 13(c), allowing nonpublic collaborative discussions, is a great idea. This is something on which I think virtually every administrative lawyer and law professor would agree. It is inefficient that Commissioners cannot have meaningful substantive discussions among themselves outside of public Commission meetings and so must send their staffs to consult and coordinate. My main suggestion is that this proposal not be limited to the FCC, as the arguments for it apply to all multimember agencies. This is not a criticism so much as an encouragement. I do not see any reason why new rules on nonpublic collaborative discussions should be limited to the FCC.

Litigation and Uncertainty

The bill will create many new standards that are subject to judicial review and that lack either agency or judicial precedents. Each of the new requirements in § 13(a), for example, creates a basis for a legal challenge beyond the existing ability to challenge the rule itself. This will likely open the door to years of litigation and uncertainty. And limiting the new standards to the FCC will increase this period of uncertainty. With new standards applicable to only one agency, establishing a set of agency practices and set of judicial standards will take many years.

Particularly unfortunate, in my view, is the invitation to litigation and unpredictability where other options are available. Section 13(a)(2)(C)(ii) is a notable example. I support cost-benefit analysis of all proposed regulations, including FCC regulations. The Office of Information and Regulatory Affairs ("OIRA") currently performs such analysis for executive agencies' proposed regulations, using standards similar to those in the bill. OIRA thus specializes in cost-benefit review and engages in it routinely. Because it is part of the Executive Office of the President (and thus outside the purview of the APA) and because the executive orders governing OIRA's cost-benefit analysis state that they do not grant judicial review, OIRA has been able to develop its analysis without the unpredictability entailed in judicial review. *See* Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992); Exec. Order No. 12,866, § 10, 58 Fed. Reg. 51,735 (Sept. 30, 1993). Rather than build on these practices, the bill directs the FCC itself to undertake the cost-benefit analysis, and it opens the door to judicial review of such analysis. This greatly reduces predictability and confers little benefit. In my view, an approach like that in the Independent Agency Regulatory Analysis Act from the 112th Congress (S. 3468), authorizing OIRA review of independent agencies' proposed regulations, makes much more sense.

Merger Review

The provisions on merger review raise a different concern. The provisions impose such rigorous burdens on the Commission that they will likely leave the Commission with little if any role. The language of § 13(k)(1)(A) is particularly striking. No existing federal statute has language like this (indeed, only three federal statutes use the term "narrowly tailored" or its variants, and one of those iterations is in the findings). "[N]arrowly tailored" is the language of strict judicial scrutiny – the most rigorous scrutiny courts apply. It is of course unclear how courts will interpret "narrowly tailored to remedy a harm that would likely arise as a direct result of the specific transfer or specific transaction" (another example of uncertainty). But in light of the particularity of the "narrowly tailored" formulation to strict judicial scrutiny and the many other ways the bill could have articulated the nexus between merger conditions and the harms from the merger, presumably the narrow tailoring language is in fact intended to invoke strict scrutiny jurisprudence. I would expect judges interpreting this provision to so conclude.

If courts apply narrow tailoring to require the least restrictive form of regulation (as courts do when applying strict scrutiny in speech cases), it may well be that no pre-merger conditions will satisfy the courts. At the outset, it is possible that a court will find that conditions triggered by post-merger actions (e.g., waiting for anticompetitive harms to arise) will be more narrowly tailored than prophylactic conditions and thus doom the latter. Even if courts do not treat conditions looking to post-merger events as less restrictive alternatives, most any pre-merger conditions the Commission might impose will be imperiled by the likelihood that creative lawyers and judges will be able to come up with some narrower form of regulation that largely achieves the same goals, even if that alternative is politically unpalatable or otherwise

infeasible. *See, e.g.,* Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 666-670 (2004); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816, 818-826 (2000).

The chances that the Commission could craft any significant merger condition that would satisfy the bill are further reduced by § 13(k)(1)(c), requiring that the relevant harm be "uniquely presented by the specific transfer of lines, transfer of licenses, or other transaction, such that the harm is not presented by persons not involved in the transfer or other transaction." No existing legislation or judicially created test has such language, so its application is uncertain. But demonstrating the uniqueness of a harm is a very tall order. The Clayton and Sherman Acts have no similar requirements, for good reason: harms (and most everything else) are on a continuum, so uniqueness may not be present even in situations that most everyone would agree will raise serious concerns.

The bottom line is that it seems likely that these provisions as written will imperil the FCC's ability to impose meaningful merger conditions beyond those that would be imposed by the FTC or the Antitrust Division of the Department of Justice, which enforce more general antitrust statutes like the Clayton Act. The FCC could not confidently play an independent role.

There has been robust debate about what FCC merger review adds to FTC/DOJ review. Congress's view may be that the FCC's review does more harm than good. If so, Congress should simply repeal the FCC's independent statutory authority to engage in merger review, thereby avoiding years of litigation and uncertainty. If, on the other hand, Congress wants to preserve a meaningful role for FCC merger review, I would suggest less rigorous language than currently appears in the transaction review provisions. There are ways to accommodate very

legitimate concerns about the breadth and scope of merger conditions while still leaving a meaningful role for the FCC.

Actions by a Minority of Commissioners

Some of the bill's provisions will reduce the power of the FCC Chairman. I tend not to favor such provisions for reasons of democratic accountability. My experience in the FCC gave me an additional reason, as the Chairman's authority provides the benefit of clear lines of authority for the FCC staff. That said, I understand the appeal of allowing a majority of commissioners to place items on the agenda. But § 13(e)(2) does not even involve a majority of commissioners. Empowering a minority of commissioners to block actions taken pursuant to delegated authority, all of which actions have the explicit or implicit approval of the Chairman, is a dramatic step that will diminish the Chairman's authority and blur lines of authority for the staff. It also has the potential to slow down thousands of decisions and thus create difficulties for businesses and individuals who rely on the existing FCC processes for predictable timetables on routine decisions.

Additions to the Rulemaking Process

Finally, the bill adds many requirements to the FCC's rulemaking process. I want to highlight two. First, § 13(a)(1)(A), by effectively requiring a notice of inquiry for every new rulemaking unless there is a finding of good cause to avoid a notice of inquiry, will subject the FCC to a hurdle that seems unnecessary. Congress has never imposed a similar requirement for notices of inquiry (a term that appears nowhere in the APA, and only once in the United States

Code), and with reason: such a requirement lengthens a rulemaking process that is already very elaborate and takes many months, mandating additional process with no clear benefit. Second, § 13(a)(1)(B)'s requirement that a notice of proposed rulemaking contain the specific language of the proposed rule will cement the transformation of the rulemaking process into a rule adopting process. In the first decades after Congress enacted the APA, notices of proposed rulemaking were often very brief, and frequently simply outlined the issue and its possible resolution. Starting in the early 1970s, judicial opinions began to require so much information and guidance in notices of proposed rulemaking that agencies were effectively required to do most of their analysis before they issued a notice of proposed rulemaking. One result of these judicial rulings was that the public comment period under § 553 of the APA came after the agency had made the most important decisions, because those decisions were made before the notice was issued. Section 13(a)(1)(B) will largely complete this transformation, as the agency will be required to have written an entire proposed order as part of its notice before the § 553 comment period. Some might welcome this transformation, on the theory that there are advantages to disclosure at the front end and that it is fine to diminish the role of comments from the public during the rulemaking process because such comments do not make much difference, anyway. But it is a remarkable transformation from where the rulemaking process started.

I will be happy to respond to any questions that you may have.

Mr. WALDEN. All right. We will get to you on questions, I am sure, and you will have a chance to elaborate. Thank you for your testimony and your participation in the hearing, Mr. Benjamin.

We will now go to the Honorable—I guess we still call you that even though you are out of office now—Robert M. McDowell, former Federal Communications Commission member, and Visiting Fellow at the Hudson Institute. Mr. McDowell, we really appreciate your coming in today to give us your unique perspective as a former commissioner and now outside of the portals can speak freely as you did when you were inside the portals. So we welcome your testimony, sir.

STATEMENT OF ROBERT M. MCDOWELL

Mr. MCDOWELL. Thank you, Mr. Chairman and Ranking Member Eshoo and all the members of the subcommittee. It is terrific to be back before you, my first time back since the leaving the Commission just about 7 weeks ago. And I did want to also make a special note to thank Neil Fried for his many, many years of public service. I have had the privilege and the honor of working very closely with Neil on I can't even count the number of issues over the years, and he has been a terrific colleague and a friend, and we wish you well in the movie business, so we will see at the movie theater, I guess.

So currently I do serve as a Visiting Fellow at the Hudson Institute's Center for Economics of the Internet. Having said that, all of the views I express today are purely my own, and they may be very lonely ideas if no one else agrees with them, but I will say them nonetheless.

FCC process reform is not necessarily the most glamorous of topics but it is an important one, and I commend the subcommittee for its ongoing work in this area. The FCC after all regulates about one-sixth of the American economy, and really indirectly affects the rest. Just as important, the Commission also serves as a regulatory template for countries across the globe. The ways in which the FCC considers proposed regulations and goes about shaping their substance has a direct effect on the U.S. economy and ultimately not just American consumers but consumers around the globe. In short, to paraphrase Chairman Emeritus Dingell, those who control the process also control the outcome. Accordingly, it is prudent for Congress to cast a bipartisan oversight eye on the processes of all administrative agencies. Chairman Walden and other members should be commended for sparking this conversation with the legislation from the last Congress as well as this year's discussion drafts.

But before going further, I would be remiss if I did not mention the need for a fundamental rewrite of our Nation's laws regulating the information, communications and technology sector. Such a comprehensive rewrite has not occurred since 1996, and even that left in place legacy stovepipes that regulate technologies rather than just market conditions. Today, consumers don't know or usually don't really care if their data is transmitted over a coaxial cable, fiber optics, copper or wireless platforms. In fact, usually data is being transmitted over hybrid networks that we are not even aware of. It is seamless to the consumer. Instead of directly

focusing on whether the marketplace is experiencing a concentration of power, abuse of that power, and resulting consumer harm, today's regulations draw their authority from the nearly 80-year-old Communications Act of 1934. The FCC will celebrate its 80th birthday next spring. And that Act is based on 19th-century-style monopoly regulation, which rests on an even older foundation. Therefore, having different regulations based on the type of technology used and their history rather than on current market conditions is likely distorting investment decisions. For the sake of improving America's global competitiveness, I respectfully urge Congress to move ahead as soon as possible with a comprehensive rewrite of our communications laws with the aim of promoting investment and innovation while protecting consumers.

Putting some of this into tangible terms, in 1961 when consumers had a choice of one phone company and three broadcast TV networks, the FCC's portion of the Code of Federal Regulations filled just 463 pages. In 2010, the FCC's rules filled 3,695 pages, despite the bipartisan deregulatory mandates of Congress as codified in the Telecommunications Act of 1996. Today, the Commission's rules fill 3,868 pages despite President Obama's call in 2011 to pare back unnecessary rules. In short, in a marketplace that is undeniably more competitive than it was in 1961, the FCC's regulations grew by more than 800 percent as just measured in the number of pages with a nearly 5 percent increase just since 2010. In contrast, the American economy has grown by a much smaller number since 1961 by about maybe 370 percent.

Some of these rules are necessary but are all of them? Shouldn't the Commission have the authority to weed out all outdated rules the way it can and must for rules affecting telecommunications services under Title II as mandated by Sections 10 and 11? Forbearance authority should apply to all platforms and industries, not just traditional telecom services.

Along those lines, as my fellow witness Randy May has advocated for quite some time, requiring the Commission to justify new rules with bona fide cost-benefit and market analyses would help better inform policymakers and restrain them from issuing unnecessary rules. Exercising discretion and regulatory humility while being patient with markets can create a better experience for consumers. Similarly, new rules should sunset after a definitive period, and the renewal should be justified from scratch in new proceedings with public notice and comment. The continuation of old rules may be absolutely necessary, but let us test that premise every few years.

I see I am running out of time. In fact, I am way out of time. But other ideas to explore should include, just for respectful mention here, limitations on unnecessary merger conditions that have nothing to do with the attendant transactions, shot clocks with exceptions, consolidation of industry reports, and regulatory fee reform, among many others.

Lastly, I would like to end with a bipartisan applause line: Let us have Sunshine Act reform so more than two Commissioners can meet to discuss substance without having to call for a public meeting. Let the record reflect there was thunderous applause on both sides of the aisle after that.

Thank you for the opportunity to speak before you today, and I look forward to answering your questions.

[The prepared statement of Mr. McDowell follows:]

STATEMENT
OF
THE HON. ROBERT M. MCDOWELL
VISITING FELLOW
HUDSON INSTITUTE
CENTER FOR THE ECONOMICS OF THE INTERNET

"IMPROVING FCC PROCESS"

BEFORE THE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
COMMITTEE ON ENERGY & COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 11, 2013

Thank you, Chairman Walden and Ranking Member Eshoo, for inviting me to join you today. It is an honor to be before your Committee again. This is my first time back since leaving the Federal Communications Commission as a commissioner almost two months ago.

Currently, I serve as a Visiting Fellow at the Hudson Institute's Center for Economics of the Internet. The Hudson Institute is a nonprofit, nonpartisan policy research organization dedicated to innovative research and analysis that promotes global security, prosperity, and freedom. Having said that, the opinions I will put forth today are purely my own.

As a brief aside, however, I'd like to thank this committee for its outstanding bipartisan leadership on federal spectrum matters. By all accounts, your June 27 hearing was a terrific success. By some estimates, the federal government occupies about 80 percent of some of the most useful spectrum. Understanding more about how efficiently that spectrum is used by the government, and undertaking a thorough analysis of alternative bands and transfer costs, will help shape better policymaking and, I hope, lead to the freeing up of substantial amounts of federal spectrum to auction for exclusive use licenses.

As a commissioner, serving for nearly seven years both in the majority and the minority, I wrote, spoke and testified frequently on some of the advantages and disadvantages of the FCC's procedures. FCC process reform is not necessarily the most glamorous of topics, but it is an important one and I commend this subcommittee for its ongoing work in this area. The FCC, after all, regulates about one-sixth of the American economy and indirectly affects the rest. Just as important, the Commission also serves as a regulatory template for countries across the globe. The ways in which the FCC considers proposed regulation, and goes about shaping their substance, has a direct effect on the U.S. economy and, ultimately, consumers.

In short, to paraphrase Chairman Emeritus Dingell, those who control the process also control the outcome. It is prudent for Congress to cast a bipartisan oversight eye on the processes of all administrative agencies. Chairman Walden and other Members should be commended for sparking this conversation with the legislation from the last Congress as well as this year's discussion drafts. It has been said that the crafting of constructive legislation is a lot like making sausage, so it is important for us to start grinding away now and debate credible ideas from all perspectives.

Before going further, however, I would be remiss if I did not mention the need for a fundamental rewrite of our nation's laws regulating the information, communications and technology sector. Such a comprehensive rewrite has not occurred since 1996, and even that left in place legacy "stovepipes" that regulate technologies rather than market conditions. Today, consumers don't know - or really care - if their data is transmitted over coaxial cable, fiber optics, copper or wireless platforms. In fact, most data travels through a multitude of hybrid networks before reaching the intended end-user. Instead of directly focusing on whether the marketplace is experiencing a concentration of market power, abuse of that power and resulting consumer harm, today's regulations draw their authority instead from the nearly eighty-year-old Communications Act of 1934. And that Act is based on 19th Century-style monopoly regulation, which rests on an even older foundation. Therefore, having different regulations based on the type of technology used and their history rather than on current market conditions is likely distorting investment decisions. For the sake of improving America's global competitiveness, I respectfully urge Congress to move ahead as soon as possible with a comprehensive rewrite of our communications laws with the aim of promoting investment and innovation while protecting consumers.

Putting some of this into tangible terms, in 1961, when consumers had a choice of one phone company and three broadcast television networks, the FCC's portion of the Code of Federal Regulations filled 463 pages. In 2010, the FCC's rules filled 3,695 pages despite the bipartisan deregulatory mandates of Congress as codified in the Telecommunications Act of 1996. Today, the Commission's rules fill 3,868 pages despite President Obama's call in 2011 to pare back unnecessary rules.[1] In short, in a marketplace that is undeniably more competitive than it was in 1961, the FCC's regulations grew by approximately 800 percent as measured in the number of pages – with nearly a five percent increase just since 2010. In contrast, the American economy has grown by a much smaller number since 1961, approximately 370 percent.[2]

Some of these rules are necessary, but are *all* of them? Shouldn't the Commission have the authority to weed out all outdated rules the way it can - and must - for rules affecting telecommunications services under Title II as mandated by Sections 10 and 11?[3] Forbearance authority should apply to *all* platforms and industries, not just traditional telecom services. (For easier reference, I have attached my July 7, 2011, testimony before this Subcommittee's sister Subcommittee, Oversight and Investigations. *See* Exhibit A.) In the absence of a comprehensive rewrite, granting to the Commission expanded statutory authority to clear out unnecessary

[1] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).

[2] The growth rate was calculated based on historical figures reported by the Commerce Department's Bureau of Economic Analysis. *See generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, "National Economic Accounts," http://www.bea.gov/national/index.htm#gdp; *see also id.*, "Current and Real Gross Domestic Product," http://www.bea.gov/national/xls/gdplev.xls.

[3] Section 202(h), adopted by a large bipartisan majority of Congress in the context of the Telecommunications Act of 1996, also compels the FCC to deregulate the traditional media sector in the face of increased competition. *See* 47 U.S.C. § 336. Under this Section, the Commission is obligated to review its media ownership rules every four years and trim back unnecessary or counterproductive rules as warranted by market conditions. Thus far, the FCC is almost four years behind schedule in the course of the most recent media ownership review.

regulatory underbrush, after appropriate public notice and comment, could help make our country's tech economy more robust and competitive.

Along those lines, as my fellow witness Randy May has advocated for quite some time, requiring the Commission to justify new rules with *bona fide* cost-benefit and peer-reviewed market analyses would help better inform policy makers and restrain them from issuing unnecessary rules. Exercising discretion and regulatory humility while being patient with markets can create a better experience for consumers. Regulators should be wary of issuing *ex ante* regulations in the absence of evidence of market failure. The law of unintended consequences sometimes works more quickly and forcefully than communications laws, no matter how noble their intentions.

Similarly, new rules should sunset after a definitive period and their renewal should be justified from scratch in new proceedings with public notice and comment. The continuation of old rules may be absolutely necessary, but let's test that premise every few years.

Furthermore, should transaction approvals be weighed down with costly and unnecessary conditions that have nothing to do with the attendant transaction? You may wish to consider a statutory requirement that the public interest requires the Commission to justify every transaction condition first and then tailor any condition narrowly. Put another way, the Commission may set a condition to cure a harm only after a meaningful economic analysis demonstrates that the merger will cause harm to consumers. Conditions impose costs on transactions that are ultimately borne by consumers. Keeping conditions streamlined to address merger specific problems would reduce costs to consumers and help spur market activity.

If I haven't said anything you can agree with yet, here is a guaranteed bipartisan applause line: please modernize the Sunshine Act so more than two commissioners can meet at a time to

discuss substance. Safeguarding the administrative law cornerstones of transparency and openness can live alongside the need to act efficiently.

While I may not be able to address every possible constructive idea, I take this opportunity to mention a few more:

Eliminate and consolidate FCC reports. I suggested some time ago that Congress consider eliminating and consolidating the myriad annual reports it has required over the years. I appreciate Congressman Scalise's efforts in this regard and I acknowledge his pending bill. I can tell you first hand that the agency spends a great deal of time and utilizes a large amount of resources gathering and analyzing information for these reports. This is especially true for the Wireless Competition Report, the Video Competition Report, and the International Broadband Data Report, to name a few. Moreover, some reports are no longer relevant and contain mere boilerplate. The Orbit Act Report, mandated in 2000 when INMARSAT and Intelsat were privatized, immediately comes to mind. Consolidating those reports that remain relevant with an eye toward removing platform-specificity would reduce reporting burdens and improve congressional oversight capabilities. Likewise, eliminating outdated reports would free up the Commission's staff to focus on those obligations that are relevant and time sensitive.

Review and reform the assessment of regulatory fees. I respectfully encourage you to consider reforming the manner in which the FCC assesses and collects the fees that fund the agency's activities. The regulatory fees process has not been overhauled since the late 1990s, yet this is an area that imposes a high burden on the agency staff, as well as causes much consternation among regulated parties. By way of brief background, I reviewed with interest last year's Government Accountability Office (GAO) report on the FCC's regulatory fee process.[4]

[4] Federal Communications Commission: Regulatory Fee Process Needs to be Updated, GAO 12-686 (rel. Aug. 10, 2012).

According to the GAO, the FCC assesses regulatory fees among industry sectors and fee categories "based on obsolete data, with limited transparency." While the Act required the Commission to base its regulatory fees on the number of Full Time Equivalents (FTEs), in other words the number of full-time staff that perform regulatory tasks in certain bureaus, the FCC has not updated the FTE analysis on which it bases its regulatory fees since 1998. As a result, the GAO concluded that, "after 13 years in a rapidly changing industry, the FCC has not validated the extent to which its fees correlate to its workload." Moreover, on average over the past 10 years, the Commission "collected two percent more in regulatory fees than it was required to collect."

The GAO makes some common-sense recommendations and I encourage you to consider them as you move forward. First, Congress ought to consider whether excess fees should be appropriated for the Commission's use or another use. Second, Congress should ask the Commission to update immediately its FTE analysis and require at least biennial updates going forward. In addition, the number of FTEs should be easily found on the agency's website both prior to and after this update is complete. Finally, in determining whether and how to revise its current fee schedule, the Commission should consider the approaches in place at other fee-funded regulatory agencies.

I respectfully offer two additional suggestions. First, consistent with their status as "information services," that the Commission refrain from assessing regulatory fees on broadband services. Second, that, for the purposes of regulatory fees, the Commission's FTE counts not include employees in areas other than the FCC's core bureaus and offices.

Conclusion. I applaud your work in the important area of FCC process reform. Experience has taught me that decreasing onerous or unnecessary regulations increases investment, spurs innovation, accelerates competition, lowers prices, creates jobs and benefits consumers. I look forward to working with all of you and thank you again for the opportunity to appear before you today.

Mr. WALDEN. Mr. McDowell, as always, thank you for your testimony, as entertaining as it always concludes. We appreciate all of the witnesses. I will start out with some comments and questions.

First of all, picking up on your last comment, I know the desire of the agency to be able to have Commissioners, more than one, meet together without a public setting. The irony coming from the State of Oregon that pioneered meeting requirements both for its legislative assembly and its agencies is that that is the one piece of this bill that would actually allow activities to occur in private that are otherwise public today, and it is also the only provision, and correct me if I am wrong, that actually amends the APA itself. So the irony is, my friends who object to these other reforms and requirements, alleging that somehow this committee would only be affecting the APA for one agency, want to affect the APA for one agency to allow members of the Commission to meet in private without a public setting and do their business. Is that not correct, Mr. McDowell, with all due respect to the applause lines?

Mr. MCDOWELL. Yes, Mr. Chairman, I agree with that.

Mr. WALDEN. Thank you.

Now, having put that on the record, let me go to the expenditure piece, and I would put in the record with unanimous consent the Congressional Budget Office cost estimate from March 19, 2012, which looked at the predecessor bill and I think was referenced by the distinguished gentleman from California.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. The CBO also went on to say that assuming appropriations and necessary amounts for personnel and information technology, under current law, the FCC is authorized to collect fees sufficient to offset the costs of its regulatory activities its year. Therefore, CBO estimates that the net cost to implement the provisions of H.R. 3309 would not be significant, assuming annual appropriation actions consistent with the agency's authorities. Yes, it does require a few more people. Guess what? Open processes do.

Mr. Ramsay, I would like to go to you as representing the public utility commissions around the country. As you know, my senior policy advisor, Ray Baum, behind me, chaired the Oregon Public Utility Commission. Much of what we are proposing here is actually already accomplished by many public utility commissions in their processes, is it not? Don't they require rules to be published in advance? Don't they almost prohibit ex parte contact? Don't they require a much more transparent process, which is what we are getting at here?

Mr. RAMSAY. Yes, sir. Generally speaking, my experience has been that the State regulatory process is more transparent and less subject to processes lapses than the FCC and other federal agencies.

Mr. WALDEN. And do you think it is right that a federal agency can require as a condition of a merger quote, unquote, voluntary actions that they could not require under their statutory authority otherwise?

Mr. RAMSAY. Well, NARUC hasn't taken a position on the merger condition authority in the statute, so I——

Mr. WALDEN. All right. I will go to Mr. McDowell. Do you think it is right that a federal agency can require two parties, or three

or five or however many in a merger, to do certain things that it could not require them to do under their statutory authority? And in fact, there are people maybe headed to the FCC who believe that authority should be used that way to affect the marketplace, and wouldn't that have an effect on other players in the market not subject to the merger, and would that be fair to them?

Mr. MCDOWELL. That was a compound question so I want to make sure I hit all parts of it. So yes, I agree that it is problematic. I have been a long-time critic of imposing merger conditions that are not related to the actual transaction. It does start to enable the Commission to impose effectively a rulemaking or other policies not envisioned by Congress so in essence, the FCC is legislating through that type of process.

Mr. WALDEN. And Mr. Benjamin, I want to pick up on one point on the notice of inquiry requirement that you objected to. We should also, for the record, point out that is only a requirement if in the prior 3 years the Commission has not done work in that area. So it is not required every single time, it is just to try and get some background information ahead of time if they are going to act or they haven't acted before. Is that not accurate?

Mr. BENJAMIN. Right. So I think the way it is written, you have to have either a notice of proposed rulemaking, which would have rules in it, or a notice of inquiry or a judicial order. So one way or another, before you start the new NPRM, you will have actually had a huge amount of process beforehand through a notice of inquiry or through a prior set of rules in an NPRM.

Mr. WALDEN. So our goal here is—many of you have had very good recommendations about things you think could be done better or differently, but our goal here—and we will take those into account as we go into a markup at some point and try to get this right. We don't want to hogtie the FCC. We don't want to add to litigation. Believe me, I get a round of applause in any town when I confess I am not an attorney. And so I have no interest in adding to the legal establishment's billing hours. I am actually trying to improve public process and open this up and do what other agencies already do and do what the President has suggested agencies not constituting the FCC do, and we will continue to work on this until we get it right but we will move forward.

So with that, my time has expired, and we have—oh, yes, I have one other UC I need to do, which are statements of support from various entities, the United States Chamber of Commerce, the National Association of Regulatory Utility Commissioners, the National Association of Broadcasters, USTelecom, Americans for Tax Reform, Citizens Against Government Waste, National Cable and Telecommunications Association, Comcast, NTCA, and AT&T, statements in support of the legislation, unanimous consent to enter into the record.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. With that, my time is expired.

Ms. ESHOO. Were they voluntary, Mr. Chairman?

Mr. WALDEN. You know, I will let you read them for yourself, and yes, I think they are all voluntary.

Ms. ESHOO. Is it my turn now?

Mr. WALDEN. It is your turn. And I will turn to my friend from California, who we have a little disagreement on parts of this bill, but I would tell you, we have 12 minutes left in the vote, so when she concludes, then we recess again and then come back.

Ms. ESHOO. Thank you, Mr. Chairman.

To all of the witnesses, I just want to share the following with you. In listening very carefully to each one of you, I leaned over and I said to Mr. Waxman, isn't it so extraordinary that we have the level of expertise that is represented at this time in our country. It makes me feel very, very proud. Whether I agree with some of your views or not is not the point but it is really nothing short of remarkable, so thank you. I love hearings, and I always learn a lot, so thank you for being here and offering what you did in your testimony.

I just want to get something straight off the table so it can be just yes or no. Do you all support a standalone action on the FCC Collaboration Act as a way of allowing FCC Commissioners to collaborate outside of official public meetings? Yes or no. We will start with Mr. Downes.

Mr. DOWNES. I don't have an opinion on that.

Ms. ESHOO. OK.

Mr. PIERCE. I think it is a good idea but I would like to see it as an amendment to the government in the Sunshine Act applies to all of the agencies that are run by collegial bodies. There is no reason—again, I see nothing unique about the FCC here. It is the same as the FERC or any other agency run by a collegial body. This would be a big improvement.

Ms. ESHOO. I appreciate that. I think what needs to be stated for the record, and I think the chairman may have thought that it was the reverse of what takes place in his home State. There is a requirement in this legislation that is bipartisan and bicameral for transparency. So it is not that Commissioners can go off in secret, the public never knows what they have talked about and discussed and that it just remains there in a secret bubble. That is not the way the legislation is drafted.

So Mr. May, yes or no?

Mr. MAY. I can't answer yes or no.

Ms. ESHOO. OK. Mr. Ramsay?

Mr. RAMSAY. Yes.

Ms. ESHOO. Mr. Benjamin?

Mr. BENJAMIN. I agree entirely with what Dick Pierce said.

Ms. ESHOO. OK.

Mr. MCDOWELL. I don't have an opinion if it is separate or together, but it is a good idea nonetheless.

Ms. ESHOO. Good. My sense of what really underlies more of this effort surrounds one issue, and that is the whole issue of the FCC's authority to review acquisitions and mergers, and I think that that is where there is concern. I think that is where there is disagreement. I think that is where there is agitation. I think there is aggravation. And I think that is driving this more than anything else, because there are some smaller reforms that can be made that we can do on a bipartisan and I think bicameral basis, but I do think that this is the area that really causes the most heartburn, both pro and con.

Now, Mr. Pierce and Mr. Benjamin, I think that you made references to this in your written testimony, and I want to give you the opportunity to elaborate on it. I think that the draft legislation only allows the FCC to impose conditions that are "narrowly tailored to remedy a harm that arises as a direct result of the specific transaction," but these transactions are huge in terms of their impact on the American people, on consumers, on media consolidation, which I think it really goes to the heart of democracy. So would either one of you care to comment on what I just said?

Mr. BENJAMIN. Sure. What is remarkable to me about the language is that it is the language of strict judicial scrutiny, and narrow tailoring, when it is—if I were a judge, I would think Congress chose this language for a reason. They chose it because they were picking up on strict judicial scrutiny because it is a term of art.

Ms. ESHOO. Well, it has been chosen for a reason. It didn't create itself.

Mr. BENJAMIN. I understand, but just to be clear, when courts apply strict scrutiny narrow tailoring, they require that the government use the least restrictive means in order to achieve a goal, and that is a very difficult standard to meet. As Justice Breyer noted in dissent in a couple of cases, any clever or creative lawyer or judge can come up with some other less restrictive means. So I think as crafted, I think it will be difficult for the FCC to have any meaningful merger conditions. And a separate question is whether the FCC should be in the business of reviewing mergers at all. My only recommendation would be then just do it and avoid a lot of confusion.

Ms. ESHOO. Well, I think that there are some here that believe that they just shouldn't. I don't know how many but I think there are some that hold that view, and they are entitled to it. But I think it is very clear that there is a public-interest standard that the FCC is charged with, and this has a lot to do with the interest of the public and the country. This isn't just about getting into some menacing details just to be complex and complicated. Would you like to comment, Mr. Pierce?

Mr. PIERCE. I didn't address this in my prepared testimony because it struck me as an issue of substantive communications law, and I am not an expert in that. I will change hats, though, and tell you I am an expert in antitrust law. That is another subject I have been teaching for the last 30-some years, and I agree completely with Mr. Benjamin that it would make a lot of sense to take the FCC completely out of this. The FCC doesn't know much about antitrust law. The FTC and the Department of Justice know a lot about antitrust law. They have the power to impose conditions. They regularly impose conditions on mergers. Those conditions are specifically tailored to address the competitive issues that are raised by a proposed merger. That is something the FTC and the Department of Justice, Antitrust Division, know a lot about, and the FCC knows very little about. So I agree completely with Professor Benjamin that the far more sensible thing would be a statutory change that would probably require about 10 words that says the FCC has no power over mergers; that is exclusively the realm of the DOJ and the FTC.

Mr. WALDEN. Mr. McDowell, I will go to you, but I have to excuse our colleagues. We are down to 5 minutes.

Ms. ESHOO. My time is expired anyway.

Mr. WALDEN. Go ahead.

Mr. MCDOWELL. On second thought, actually there is an emerging headline right here, which is, I would agree.

Mr. WALDEN. You would agree?

Mr. MCDOWELL. I would agree.

Mr. WALDEN. With what?

Mr. MCDOWELL. Antitrust review is a form of public-interest review. So DOJ or FTC under the antitrust review, they are looking at harms to consumers, and the public-interest standard of the FCC is really ill defined and that is why you get these merger conditions which sometimes have nothing to do with the emerging transaction resulting in any consumer harm. So we might be on to something here.

Mr. MAY. I agree as well, Mr. Chairman.

Mr. WALDEN. All right. I have to cut this off right now because we have got less than 4 minutes for the vote on the floor. They expect a few votes thereafter like 15 minutes, so I am going to suggest we will try and come back here about 1 o'clock, a little after 1:30, if that works. If there are others who have questions——

Mr. WAXMAN. Mr. Chairman, I have an appointment at 1:30. Otherwise, I am here and I wanted to get my——

Mr. WALDEN. OK. We will come back.

Mr. WAXMAN. At 1 o'clock?

Mr. WALDEN. I am just speculating that because they said votes about 12:30, 12:45. By the time we get back, it will probably be a little after 1:00. If we are back sooner, we will start sooner, but to give them—you all plan 12:45. How is that? And if we can get back here at 12:45, we will, because I want to make sure other members have their chances to ask questions of our distinguished panel.

With that, we will stand in recess.

[Recess.]

Mr. WALDEN. We will call back to order the Subcommittee on Communications and Technology on our "Improving FCC Process" hearing, and we appreciate your indulgence. I hope you all had a chance to get out and get a little lunch or something while we were voting. You didn't? Uh-oh. Well, sequester strikes again.

We are going to go now to the vice chair of the subcommittee, Mr. Latta, for 5 minutes for questions.

Mr. LATTA. Well, thank you very much, Mr. Chairman. I appreciate that. And again, thanks for our witnesses. We have had a few votes this morning, and I appreciate your willingness to stick around.

Mr. May, if I could ask a question in regards to forbearance reform at the FCC and get your thoughts on that?

Mr. MAY. Thank you, Mr. Latta. In my view, it was pretty clear when Congress put the forbearance authority in the 1996 act that it intended it to be used when appropriate as a deregulatory measure when competition warranted, and I think the fact of the matter is—and that is also true of the regulatory review provision that follows it, the periodic regulatory review. The fact of the matter is that the forbearance authority has just been little used as a de-

regulatory tool. So what I have recommended, and I think you have just introduced a bill which may be somewhat along these lines is that without changing the substantive criteria in the forbearance provision that is protecting consumers and protecting the public interest, that none of that would be changed, but that the Commission in order to maintain regulations when it has a petition to forbear, that is bear the evidentiary burden, in other words, there be a presumption that the statutory requirements aren't met absent clear and convincing evidence or some type of burden. And I think by doing that, without changing, again, the substance of the criteria, just as a matter of process and procedure, it would leave the tool to be used more as I believe Congress intended when it included it in the Act back in 1996.

Mr. LATTA. Thank you.

Mr. McDowell, could I get your thoughts on forbearance reform?

Mr. MCDOWELL. Yes, as I said in my written and oral testimony, Congressman, I think it would be a terrific idea to expand that to more than just telecommunications services, which is what Congress did in the 1996 Act. Now, having said, there is a little footnote, which is Section 336, for some reason referred to as Section 202(h). So our quadrennial media ownership review is also supposed to be a review and to deregulate as more competition comes into the media space, but beyond that, for cable, for wireless and other areas, the Commission does not have forbearance authority. So I think it would be constructive to expand that authority to all aspects of what the Commission regulates.

Mr. LATTA. Thank you.

Mr. Ramsay, if I could turn to your testimony. You state something there that I mentioned in my opening remarks. You state that "Unquestionably, especially when there is certain lapses that occur, unfortunately, when that occurs, those with limited resources, small business, State commissions, consumers, consumer advocates, are disproportionately disadvantaged," and that is what I hear a lot back home from all these smaller companies out there that, you know, they don't have the resources. Can you just elaborate a little bit on that, how you see that for those that would be disadvantaged that have more limited resources?

Mr. RAMSAY. Well, the problem is, if you have fewer resources and you get—and again, I can go back to the transformational order that revised the entire Universal Service program at the federal level. There were literally hundreds of items that went into the record shortly before the deadline for further advocacy dropped, and if you only have one or two lawyers, and in my case, it is one lawyer, there is no way that you can go through and look at all of those materials and respond really at all, whereas larger, better funded people frequently can. In fact, larger and better funded people are frequently the source of a lot of the last-minute filings. So in this particular case, there are two or three provisions that I cite in my testimony that would level the playing field a little more for the consumer advocates, the State public utility commissions and the small businesses and small entities.

Mr. LATTA. Because that would also really impact those startups out there.

Mr. RAMSAY. Yes, I would think so, the people with limited resources.

Mr. LATTA. And I have met with a lot of the smaller startups and they are always concerned because, you know, they are just getting started and all of a sudden they don't have those dollars that they have to have to try to meet these regulations that are in place.

And Mr. Chairman, I will yield back the balance of my time. Thank you very much.

Mr. WALDEN. The gentleman yields back the balance of his time. The chair recognizes the gentleman from California, Mr. Waxman, for 5 minutes.

Mr. WAXMAN. Thank you very much, Mr. Chairman. Before I get to my questions, I want to make a brief comment about the subject that was raised before we broke, and that was whether the FCC jurisdiction on the public interest is something in addition to the role of the Department of Justice and the Federal Trade Commission. Under the test, the FCC will approve a transaction if considering the potential consumer benefits and harms, it determines that the transaction is in the public interest. That is a little different than just the antitrust issues. For example, the FCC looks at the diversity of voices. They look to see whether certain populations are being served, low-income people, disabled people. They will look to see what the impact is on jobs. They will look at questions of access to telecommunications services. All of these are part of what the FCC deals with when we talk about public interest.

The DOJ process is entirely confidential. The FCC process is generally open with public comment and advocacy subject to certain exceptions for proprietary information. So I don't want to leave anyone with the impression that we all agree and maybe you really don't all agree when you think about that the role is duplicative or less than critical for the FCC to maintain that power.

When Chairman Walden circulated the discussion draft earlier this week that adds new provisions to the bill that was passed by the House last year, I believe these provisions further incapacitate the FCC, and I would like to ask our witnesses questions about two of these provisions.

The draft legislation contains a new provision that requires the Commission when considering a rule with an economically significant impact—those are the words—to, among other things, "make a reasoned determination that market forces and changes in technology are unlikely to resolve within a reasonable period of time" the problems the Commission intends to address in the rule. In other words, the new language requires the FCC to determine whether technology and market changes will solve a problem and negate the need for regulation before issuing a rule.

Mr. Ramsay, in your testimony, you suggest that this provision seems, at best, unnecessary because regulators should take a technology-neutral or functional approach to oversight of any market sector. Do you think basic principles like protecting consumers and promoting competition should be linked to changes in technology and are regulators in a good position to make predictive judgments about future changes in technology?

Mr. RAMSAY. I think the part of my testimony that addresses that was focused on the fact that technology and technology

changes are only relevant to the extent that they actually impact market forces. The reasons for regulations—and NARUC has been on record for years. The reasons for regulation don't change ever, and they don't change based on the technology that is being used to provide a particular service. So in the case of——

Mr. WAXMAN. Excuse me. Do you think this language is important to have, or do you think——

Mr. RAMSAY. I think the reference to technology is not necessary. It is perhaps a little confusing in the context of that Section 3 and it doesn't add anything to any type of determination of the level of competition that exists.

Mr. WAXMAN. I thank you for that answer. I am going to move on to some other issues.

The APA applies to all agencies, and this bill would accept that, which the chairman pointed out to me, that his bill specifically says that they are not excluding—"nothing in this Act or the amendment made by this Act shall relieve the FCC from any obligations under Title V, United States Code, except where otherwise expressly provided."

Now, Mr. Pierce, you have indicated that this adds another layer of requirements on the FCC which could be litigated, and what was once litigated under the APA may not apply when there are new provisions. Is that a correct statement of your view?

Mr. PIERCE. That is correct, and actually the provision you were just referring to is a good illustration of that. I mean, there is certainly nothing wrong with it. In fact, it would be laudable for the FCC to look at the relationship between market forces and technology and the need for regulation and look at the likelihood, but as soon as you put that in the statute, you have got more lawyers' work, and when it is an agency-specific statute, the likelihood is that it will take 15, 20 years before we get a settled judicial interpretation of what that means, and I don't have any idea what that—and I don't know what the triggering language will be.

Mr. WAXMAN. I thank you for that answer.

This draft legislation also contains a new provision that would require advance notice to the Commissioners of any decision or action taken at the bureau level, known as delegated authority, and the provision empowers two or more Commissioners to block any use of such delegated authority, instead require that the issue be considered by the full Commission. So two members can, in effect, hold hostage things that are routinely done at the bureau level. Now, most of what the FCC does in 2012, there are 165 items released by the full Commission, in 2014, items released at the bureau level. That means 92 percent of all the actions the FCC took last year were pursuant to delegated authority at the bureau level. So my concern is that if two Commissioners could block the exercise of this authority and require what could have been a routine matter to be addressed by all five Commissioners, that is going to be an extra burden. It is sort of like the Senate that can stop things from happening but putting holds on nominees or requiring a threat of a filibuster.

Professor Benjamin, would you be concerned this might allow a minority of Commissioners to frustrate the will of the majority or

the chairman's agenda, potentially adding weeks or months of delay to routine actions supported by the majority?

Mr. BENJAMIN. Yes. The serious question would be, why would you want to empower a minority that way? Because there really are thousands of decisions that we are talking about, and right now there are fairly clear lines of authority in the Commission which makes for greater efficiency. So if I were a business before the agency with a routine matter, I would be concerned.

Mr. WAXMAN. Thank you. My time is up. But Mr. McDowell wanted to respond.

Mr. WALDEN. We will do that on Mr. Scalise's time, I think. Mr. Scalise?

Mr. SCALISE. If the chairman is so inclined, could I yield to the chairman?

Mr. WALDEN. I would appreciate that. Thank you.

So I want to point out why we have added that provision, and Mr. McDowell, as a Commissioner, please feel free not only to weigh in on Mr. Scalise's time subsequently yielded but also on what I am about to say.

So it is routine, Mr. Benjamin, that they have these delegated authority and these things go through, but there has also been a custom, I believe, of 48-hour notice for the other Commissioners so they know what is going through on delegated authority. Recently, there was a case where an item was put on up on delegated authority on a Friday night triggering the 48-hour notice over the weekend. Now, I don't think there was any mischief in that, but at some point here you could have a lot of mischief occur over a weekend. And so we are saying, you know, two Commissioners could say wait a minute, whoa, whoa, whoa, what are you doing on supposed delegated authority, because I don't think that is always clearly spelled out.

But Mr. McDowell, are we hitting on something here?

Mr. MCDOWELL. A little bit of history here. First of all, it is rare for Commissioners to ask for anything that is being done under delegated authority to be elevated to an 8th-floor vote. It wouldn't be, with all due respect, akin to a hold in the Senate. What it is, it is asking for an 8th-floor vote on these things rather than the bureau issuing the role. And, you know, before this hearing I polled some of my former staff to ask them how many times did we actually ever want something to be elevated to an 8th-floor vote, and we could count on less than one hand the number of times in my 7 years there where that would actually happen. So it wouldn't hold things up per se. What it actually might do is in a way speed things up because bureau decisions can be brought to the 8th floor through petitions for reconsideration and other administrative vehicles, and that takes time to get to the 8th floor, so you could actually be short-circuiting that sort of appeals process, and also keep in mind, it is very rare. And by the way, in the past when it happened, I mean, one of the instances had to do with a switch digital issue and set-top boxes during Chairman Martin's tenure, and the other four Commissioners, two Republicans and two Democrats, we were very concerned about the direction that was heading in. It was an enforcement proceeding. So it was a bipartisan issue, the same with some other issues that I worked with Commissioners

Copps and Adelstein on during that era. So it is very rare and also——

Mr. WALDEN. Make it real quick because I am using up his time. So let us go to Mr. Scalise. Thanks for your indulgence.

Mr. SCALISE. Thank you for yielding back. Those are the exact questions I was thinking of asking myself, Mr. Chairman. I appreciate you asking them in a much more eloquent way with that great radio voice that you have.

I am glad that we are having a hearing on FCC process reform. I was little surprised at the beginning of the hearing that there were some that were expressing objection or concern about us taking up FCC process reform, and obviously, Mr. Chairman, you have got two bills on this agenda that we are talking about, and both of them deal with, I think, very important reforms. But when you look—the IRS serves as a poster child for what happens when a federal agency thinks that they are no longer accountable to the American taxpayer, and you just look at the abuses that are happening because they weren't reform, because they didn't think that they had to answer to anybody. And so when we talk about reforming processes at the FCC, it is critical that Congress play this role. And look, if the Senate doesn't think it is important to have transparency and accountability and reform, let them go out and defend it, but shame on us if we don't exercise our responsibility in making sure that these federal agencies that we oversee are accountable, because we have seen some troubling examples at the FCC, and I think, Mr. Chairman, you pointed out some real concerns, especially as we have seen with mergers in the past and then the comments by Mr. Wheeler where he in essence was tacitly condoning the practice of the FCC literally just trying to hold up a merger unless companies would accept regulations, de facto regulations that Congress didn't even pass. So Congress said we don't think that this should be a law, and somebody at the FCC who thinks they are unaccountable says I think it should be a regulation anyway and even though I can't get it approved, I will just hold up a company's merger unless they agree to something that Congress doesn't even think should be passed, and I think that is a major concern of a lot of us. I think there is some real issues that need to be pursued on that. We need to get involved congressionally and stop them from doing this.

Commissioner McDowell, in my last few seconds here, I want to ask you about it. First of all, I want to ask, does anybody on the panel think it is oK for the FCC to shake down a company, to hold up a merger over requiring them to accept a regulation that Congress didn't even pass? Does anybody want to defend that practice? I am glad to see, it is sort of like the thunderous applause you had, Commissioner McDowell. Nobody wants to defend it. But did you see it when you were at the FCC? Did you see that kind of what I think is unethical activity?

Mr. MCDOWELL. Sure. There are reasonable differences in interpretation of what the public interest is. I have had a lot of conversations with my colleagues over the years over this, and some think that anything that benefits the public is the cost of the transaction. I disagree with that. I think it has to do with, is there a merger-specific harm to consumers that needs to be cured. Others

think that it is a broader interpretation of a public-interest standard, but that is precisely what the bill, I think, tries to address is to put a fence around that, a definition around what the public-interest standard would be.

Mr. SCALISE. I think that would be important to have, so I thank you, and I thank you, Mr. Chairman. I yield back.

Mr. WALDEN. I now recognize the chairman emeritus of the committee, the gentleman from Michigan, Mr. Dingell.

Mr. DINGELL. Mr. Chairman, I thank you for your courtesy. I commend you for this hearing.

Like the chairman, I am very much concerned about the somewhat curious functioning of the Federal Communications Commission, so I performed a very thoughtful analysis of the Commission Reform Act to see how it works, and one of my first concerns it, it seems to affect in a curious way 67 years of administrative law and related jurisprudence. It subjects only one federal agency to unique administrative procedures that will be different than all of the others and will open the door to years of litigation and uncertainty, ultimately stymieing, I think, rather than streamlining the work of the Commission.

My questions this morning are directed to Mr. Benjamin and they concern only the draft Federal Communications Commission Process Reform Act. I hope you will oblige me, sir, with yes or no answers.

Mr. Benjamin, with respect to the Commission's rulemaking authority, I note that Section 13(a)(2) of the draft bill mandates the Commission to fulfill a number of new requirements prior to amending or adopting a new rule. Is it your understanding that a party could challenge the Commission's completion of such new requirements in court? Yes or no.

Mr. BENJAMIN. Yes.

Mr. DINGELL. Now, Mr. Benjamin, the practical effect of such judicial review would be to slow or to hinder the Commission's ability to promulgate new rules, yes or no?

Mr. BENJAMIN. Yes.

Mr. DINGELL. And it would be a significant change in the Administrative Procedure Act, would it not?

Mr. BENJAMIN. Yes, with respect to the FCC.

Mr. DINGELL. Now, Mr. Benjamin, the new requirements in Section 13(a)(2) contain undefined terms such as "specific market failure", "actual consumer harm", "burden of existing regulation" and "reasonable period of time." Is it probable that interested stakeholders will challenge the Commission's application of such terms in the event stakeholders disagree with the Commission's ruling on a particular matter in court? Yes or no.

Mr. BENJAMIN. Yes.

Mr. DINGELL. Now, Mr. Benjamin, again, the practical effect of such challenges would be to hinder and to slow the Commission's ability to agree on new rules or to amend or rescind existing rules. Yes or no?

Mr. BENJAMIN. Yes.

Mr. DINGELL. Now, so far it would seem then that one of the draft bill's primary effects would be to sand the gears of the Commission when it comes to rulemaking. I would like to turn my at-

tention to the draft bill's effect on the Commission's merger review authority.

Now, Mr. Benjamin, Section 13(k)(1)(A) requires that the Commission impose conditions on transactions and transfers that are "narrowly tailored to remedy a harm that would likely arise as a direct result" of such transactions and transfers. Is it your opinion that this requirement will invite strict scrutiny by the courts of merger conditions imposed by the Commission? Yes or no.

Mr. BENJAMIN. Yes.

Mr. DINGELL. And it would be a fine opportunity for repeal and judicial review, right?

Mr. BENJAMIN. Sorry, repeal?

Mr. DINGELL. The conditions and so forth would be a fine opportunity for judicial review?

Mr. BENJAMIN. Yes.

Mr. DINGELL. Now, Mr. Benjamin, is it your opinion that it will be extremely difficult to craft merger conditions that would satisfy Section 13(k)(1)(C) of the draft bill, which specifies that such conditions address a harm "uniquely presented by the specific transfer of lines, transfer of licenses or other transactions such that the harm is not presented by persons not involved in the transfer or other transaction." Yes or no?

Mr. BENJAMIN. I think I understand your question. Yes.

Mr. DINGELL. That is a wonderfully complex sentence too, isn't it?

Now, Mr. Benjamin, additionally, I note that Section 13(k)(2) of the bill prohibits the Commission from adopting voluntary merger conditions that are not consistent with the conditions I mentioned in my previous questions. Is it your opinion that such prohibition would serve as additional roadblock to merger approvals and to potentially diminish, if not eliminate, the Commission's role in merger reviews? Yes or no.

Mr. BENJAMIN. Yes, in combination with the other provisions.

Mr. DINGELL. I am running out of time and I apologize to you.

Now, finally, is it correct that the draft bill provides no additional authorizations of appropriations or personnel for the Commission to comply with the new requirements of the legislation which would impose a demand for new personnel, money and so forth through the agency? Yes or no.

Mr. BENJAMIN. Yes.

Mr. DINGELL. So the long and short of this is that the draft bill then could conceivably hinder the Commission rulemakings but also severely restrict its ability to approve mergers. At this point I am rather distressed to note that the bill would impose a kind of curious Magnuson-Moss rulemaking requirement on the Commission which will not streamline its processes or provide it with resources with which to comply with the draft bill's new and more onerous mandates.

I say this to you, Mr. Chairman, with affection and respect, in the hope that the committee will continue to seek the views of stockholders and stakeholders about the draft bill that will enable it to work to expeditiously conduct the business of the Commission, and I would hope that the thoughtful work of the committee will enable us to solve some of the questions that appear here to stand

in the way of writing good legislation. I thank you for your courtesy to me.

Mr. LATTA [presiding]. Thank you. The gentleman's time has expired, and at this time the chair recognizes the gentleman from Illinois for 5 minutes.

Mr. KINZINGER. Thank you, Mr. Chair, and thank you, gentlemen, and you made it to the bottom row so you are almost about to go home. Congrats.

Thank you for being out here. The discussion we are having is important regarding the efficacy and efficiency of the regulatory environment. In looking through the written testimony, one statement that really caught my eye in Mr. Downes' testimony was transfers delayed are consumers underserved. That sums up a lot of this debate quite nicely.

We are all trying our best to complete work that will best serve our constituents, but the problem is that overly caustic and nonstandardized regulations keep delaying the possible benefits of the changes in the telecommunications industry for our constituents. With the continuing advances of technology occurring at such a rapid pace, I do believe that current FCC process needs to be reformed to deal with such a unique industry.

That brings us to the topic of today's hearing, the draft legislation for FCC process reform and the FCC Consolidated Reporting Act. We discussed similar legislation in the 112th Congress, which actually passed the House in a bipartisan manner, and I am happy to see that we are back today discussing what I believe are much improved versions of those pieces of legislation.

The FCC process reform draft will make great strides in improving the predictability, efficiency, and most importantly, the transparency of the FCC in its operations. Government transparency is a major key to gaining the trust of the American public, and this draft legislation includes a number of provisions that will not only standardize many of the actions of the FCC but will also make it more transparent to the general public.

I would also like to add that I do appreciate the efforts of former Chairman Genachowski and Acting Chairwoman Clyburn on many of these issues. As I have said before, though, statutory authority should be what drives the decision-making process at the FCC, not the discretion of whomever may be the chair during a specific period of time.

In response to some of the questions, however, that we just heard, I would like to ask Commissioner McDowell, I am going to give you a number of questions and we will do the yes-no thing if that works for you. While most agencies are subject to the APA, they don't all rely on procedures that differ to varying degrees such that no agency actually has the same processes. Is that correct?

Mr. MCDOWELL. Exactly, yes.

Mr. KINZINGER. Do the new requirements in the bill requiring the FCC to actually justify its actions prior to adopting a rule constitute good government practices that will result in better rules?

Mr. MCDOWELL. Yes.

Mr. KINZINGER. Do stakeholders currently challenge most of the Commission's significant decisions in court even when the FCC is on relatively firm ground?

Mr. MCDOWELL. Pretty much everything the FCC does gets appealed, yes.

Mr. KINZINGER. Understood. Has poor FCC process and weak analysis caused the litigation?

Mr. MCDOWELL. It has, but again, everything gets appealed, even when it is strong.

Mr. KINZINGER. All right. A lot of lawyers in this town.

Mr. MCDOWELL. Yes.

Mr. KINZINGER. So is it fair to say the bill won't really increase the amount of litigation but actually might reduce it, do you think?

Mr. MCDOWELL. I don't know if it will reduce it but it could help make for better public policy.

Mr. KINZINGER. OK. Does the FCC itself often adopt requirements that contain undefined terms?

Mr. MCDOWELL. All the time.

Mr. KINZINGER. Does leaving some terms in the bill undefined and allowing the FCC to define them provide flexibility to the agency?

Mr. MCDOWELL. It provides more certainty, and therefore, for future Commissions would limit the sort of arbitrary nature of whoever is in those chairs interpreting more ambiguous terms.

Mr. KINZINGER. Thank you. Doesn't the bill leave the public-interest standard intact and still allow the FCC to deny transactions or impose tailored conditions such as divestitures of certain assets?

Mr. MCDOWELL. Yes, and real briefly, I think it actually makes things more efficient in that regard. So if you are narrowing the scope of merger approval process and the substance of it, then you are actually, I think, speeding things up, that there are a lot of extraneous things that could not be examined because it is not specific to the merger.

Mr. KINZINGER. And lastly, is it your belief that there are sufficient bodies at the FCC that some could be spared to help implement this new law and that the improvement in policy would be well worth the effort?

Mr. MCDOWELL. I think the improvement would be well worth the effort.

Mr. KINZINGER. Excellent. With that, I have got 50 seconds left, I don't want to get into a new line of questioning, so Mr. Chairman, I will yield back. Do you want——

Mr. WALDEN. If you don't mind yielding to the gentleman?

Mr. KINZINGER. I will yield to the esteemed gentleman.

Mr. LATTA. The gentleman yields.

Mr. WALDEN. So Mr. McDowell, just in the final 40 or so seconds here, we didn't get time to really get into chevron deference and what agencies can do, and the courts have a pattern of deferring to what agencies have done, if they have done their work, correct?

Mr. MCDOWELL. If they have done what? I am sorry.

Mr. WALDEN. Well, if they have followed their procedures and they have shown how they complied, haven't courts also given chevron deference to the FCC in matters?

Mr. MCDOWELL. On procedure but also on the substantive statutory language if they are following that and are faithful to Congress's intent, yes.

Mr. WALDEN. Because again, back to the Oregon example with the public utility commission, if you do your job, the courts will generally—isn't this true, Mr. Ramsay—defer to the expert agency?

Mr. RAMSAY. Particularly on factual terms, yes, sir.

Mr. WALDEN. My time, your time is expired. I will let the chairman wrap it up.

Mr. LATTA. The gentleman's time has expired, and at this time I defer to the chairman to see if there is any further business to come before the committee?

Mr. WALDEN. I don't believe so. We want to thank our witnesses, though, for your expert testimony. It is very helpful. We realize we have a work product in front of us. What you have suggested will help us refine that product and get it right, and we will continue our efforts to reform this agency in a way that makes it a leader for the other agencies, and since we don't have full jurisdiction over the APA, we can only do what we can do, but we are going to do it. So thank you all.

Mr. LATTA. Hearing no further business before the committee, the committee stands adjourned.

[Whereupon, at 2:00 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

March 19, 2012

H.R. 3309
Federal Communications Commission Process Reform Act of 2012

As ordered reported by the House Committee on Energy and Commerce on March 6, 2012

H.R. 3309 would make a number of changes to procedures that the Federal Communications Commission (FCC) follows in its rulemaking process. The bill also would require the FCC to create a database, made available to the public, that contains information about complaints made by consumers.

The bill would require all notices of proposed rulemakings (NPRMs) to be preceded by a notice of inquiry and would require the agency to allow 60 days for public comment prior to issuing an NPRM. Currently, about one-third of the agency's NPRMs follow a notice of inquiry and the length of time allotted for public comment varies. H.R. 3309 also would require a broader review of any rules expected to have an economic impact greater than $100 million and a determination that the benefits of such a rule justify its cost. Further, the bill would make changes to the timing and availability of certain reports proposed by the FCC.

Based on information from the FCC, CBO estimates that the agency would require 20 additional staff positions to handle the new rulemaking, reporting, and analysis activities required under the bill. CBO estimates that implementing the provisons of H.R. 3309 would cost $26 million over the 2013-2017 period, assuming appropriation of the necessary amounts, for additional personnel and information technology expenses. Under current law, the FCC is authorized to collect fees sufficient to offset the cost of its regulatory activities each year; therefore, CBO estimates that the net cost to implement the provisions of H.R. 3309 would not be significant, assuming annual appropriation actions consistent with the agency's authorities. Enacting H.R. 3309 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 3309 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

To the extent that the FCC would increase annual fee collections to offset the costs of it additional regulatory activities, the bill could impose a private-sector mandate on some commercial entities regulated by the FCC. Based on information from the FCC, CBO estimates that the cost of the mandate would be small, and fall well below the annual threshold established in UMRA for private-sector mandates ($146 million in 2012, adjusted annually for inflation).

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

"The U.S. Chamber of Commerce applauds Chairman Walden and the members of the Subcommittee for again taking up the issue of Federal Communications Commission (FCC) process reform. FCC regulations and policies increasingly impact wide sectors of the U.S. economy that are responsible for job growth and innovation. The Chamber supports efforts to make the FCC's current regulatory process more consistent, efficient, transparent, and reflective of today's dynamic and competitive communications marketplace." – Bill Kovacs, Senior Vice President for the Environment, Technology and Regulatory Affairs, U.S. Chamber of Commerce

AT&T STATEMENT REGARDING LEGISLATION TO IMPROVE THE FCC PROCESS

July 11, 2013

The following statement may be attributed to Tim McKone, AT&T Executive Vice President of Federal Relations:

"We welcome all efforts to improve the transparency, decision making and efficiency of regulatory agencies. To that end, the Federal Communications Commission (FCC) reforms proposed by Chairmen Fred Upton and Greg Walden are common sense improvements, with consumers ultimately reaping the benefits of a modernized agency.

"We look forward to working with the full Energy & Commerce Committee as the legislative process moves forward."

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Of course we appreciate the Committee focusing attention on the processes by which the Commission ultimately reaches decisions that affect vital communications services upon which all Americans depend.

As a representative of hundreds of small, community-based communications providers who operate in high-cost rural areas, NTCA welcomes a dialogue on how best to ensure that communications policy is developed through procedures that take full and fair account of every stakeholder's voice, regardless of size. Transparency and regulatory certainty are certainly important to every telecom industry participant, but they are essential for small, rural network operators who must make significant, long-term investment decisions in hard-to-serve reaches of the country.

The decisions made by the Commission are of critical importance to small providers who carry out the congressional mission of universal service for consumers in high-cost rural areas. NTCA thanks the Committee for its thorough examination of the ways in which the Commission's decision-making process might be improved and enhanced, and we look forward to working with the Committee to ensure that such process reforms can promote regulatory certainty and rational, transparent decision-making.

Sincerely,

Tom Wacker
Vice President of Government Affairs
NTCA-The Rural Broadband Association

Today, the House Energy & Commerce's Subcommittee on Communications and Technology is holding a hearing on "Improving FCC Process" and draft legislation on FCC process reform. The following statement is attributable to David L. Cohen, Executive Vice President, Comcast Corporation:

"At Comcast we have long believed, given the changing marketplace dynamics and implications of FCC decisions, that certain reforms of FCC processes and procedures are appropriate. We applaud Chairman Walden for his efforts to offer a discussion draft, which represents an important next step towards modifying regulatory reforms that have been long discussed by many different Commissions regardless of party or leadership. As we have throughout this process, we look forward to continuing to working with the Chairman, members of the Committee, and the Administration to evaluate and refine the proposed legislation to ensure that a suitable set of reforms are set forth."

PRESS RELEASES

July 11, 2013

STATEMENT OF NCTA PRESIDENT & CEO MICHAEL POWELL REGARDING TODAY'S HOUSE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY HEARING ON FCC PROCESS REFORM

"We thank Chairman Walden and members of the committee for their continued interest in improving FCC procedures and processes. Given today's competitive communications landscape, it is appropriate that policymakers carefully consider new ideas that promote transparency and predictability in decision making, streamline reporting requirements and remove outdated regulatory obstacles."

Contact: Brian Dietz/Joy Sims, (202) 222-2350

COUNCIL FOR
CITIZENS AGAINST GOVERNMENT WASTE

Thomas A. Schatz
President

July 11, 2013

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology
Washington, DC 20515

Dear Subcommittee Members,

Today, the House Energy and Commerce Subcommittee on Communications and Technology will hold a hearing on Federal Communications Commission (FCC) Reform. Part of the discussion during this hearing will cover two draft bills to reform the FCC process and reporting requirements. On behalf of the more than one million members and supporters of the Council for Citizens Against Government Waste (CCAGW), I urge you to support these draft bills.

The rate at which federal agencies produce new rules is alarming. In 2009, the federal government issued 3,316 new rules and regulations, the equivalent of 1.6 rules per working hour. According to a February 21, 2013 report card from the Competitive Enterprise Institute, federal agencies published a total of 3,706 final rules in 2012, 108 of which came from the FCC, or an average of one new final FCC rule every 2.3 working days.

The report further estimated that the FCC creates the third most expensive set of rules, costing an estimated $142 billion per year, but due to a lack of government transparency, the information on complete cost of the regulations is difficult to ascertain. Government regulations are often far-reaching and place significant new burdens on consumers and businesses. This is especially true at the FCC, even as wireline, wireless and cable providers continue to invest billions of dollars, create jobs, and remain competitive during a tough economy.

The legislation being debated by the Committee would streamline FCC operations and rulemaking by increasing transparency and accountability and minimizing potential agency overreach. The legislation would require the FCC to identify a market failure or consumer harm before proposing new rules; conduct a cost benefit analysis before adopting major rules that will cost more than $100 million and establish performance measures to evaluate the effectiveness of these major rules; publish the full text of proposed rules that are under consideration; provide adequate time for the public to provide comments; and set specific schedules to issue decisions and report back to Congress.

1301 Pennsylvania Avenue, N.W.
Suite 1075
Washington, D.C. 20004
202-467-5300

COUNCIL FOR
CITIZENS AGAINST GOVERNMENT WASTE

Thomas A. Schatz
President

In his comments during the July 3, 2013 FCC approval of the Softbank-Sprint-Clearwire licensing and authorization transfer agreement (FCC Docket No. 12-343), FCC Commissioner Ajit Pai discussed the need for Congress to codify the 180-day shot clock for the FCC, so that the agency has a requirement to move with greater dispatch on these transactions. The draft legislation before the Committee contains such language. The draft bill would also prohibit the FCC from conditioning a merger on a party's acceptance of certain policies or rules that are unrelated to the specifics of the transaction. American businesses should not be forced to swallow new requirements that lack relevance or policy justification at the expense of consumers and taxpayers.

The second bill would streamline the reporting requirements at the FCC and further enhance the reform process. I strongly urge you to support these two bills to protect American taxpayers, businesses, and consumers from unnecessary regulatory burdens and to ensure a high standard of quality and accountability in the FCC's rule-making process.

Sincerely,

Thomas Schatz

1301 Pennsylvania Avenue, N.W.
Suite 1075
Washington, D.C. 20004
202-467-5300

AMERICANS for TAX REFORM

722 12th Street N.W.
Fourth Floor
Washington, D.C.
20005
T: (202) 785-0266
F: (202) 785-0261
www.atr.org

Digital Liberty

July 10. 2013

U.S. House of Representatives

RE: Federal Communications Commission Process Reform

Dear Chairman Upton & Chairman Walden,

I write to support Congressional efforts in Federal Communications Commission process reform, which will be discussed in the upcoming Energy and Commerce Subcommittee on Communications and Technology hearing. In keeping with the Presidents' goals of a "smarter, more innovative, and more accountable government," Congress should continue its efforts to reform FCC rulemaking process and increase FCC transparency as outlined in two bills sponsored by Chairman Greg Walden and passed by the House in the 112th Congress.

The FCC effectively oversees one-sixth of the nation's economy, yet has little regard for how the mandates and regulations it enacts impact the pocketbooks of consumers and businesses. The legislation requires the Commission to provide a cost-benefit analysis justifying its rulemakings. The FCC has an abysmal track record of considering actual market failure or consumer harm when establishing new rules. This truth was brought to light most notably during the Commission's lengthy Net Neutrality proceeding. The measure would also stop the FCC from making merger approvals contingent on politically motivated, unrelated, and extraneous regulatory conditions.

Additionally, Congress should codify shot clocks for Commission proceedings, curbing the FCC's untimely responses when deliberating a new rule, merger, or otherwise. As evidenced during the AT&T/T-Mobile merger and Universal Service Fund proceedings – amongst others – the FCC frequently starts and stops the clock for political gain. This legislation would ensure proceedings are conducted in an even-handed manner for matters before the Commission.

The Federal Communications Commission has undertaken numerous proceedings in recent years with little regard for its impact on consumers, the economy, or even statutory authority. We urge you to support serious changes to the FCC process that will make the agency more accountable to consumers, business and Congress. If you have any questions, please contact Katie McAuliffe at (202) 785-0266.

Onward,

Grover Norquist
President, Americans for Tax Reform

NEWS RELEASE

www.ustelecom.org

FOR IMMEDIATE RELEASE
Thursday, July 11, 2013

CONTACT: Anne Veigle
202.326.7344
CONTACT: Karn Dhingra
202.326.7325

FCC BILLS PROVIDE PATH FOR BIPARTISAN REFORM EFFORTS

Background: Today the House Energy and Commerce Committee's Subcommittee on Communications and Technology is holding a hearing to discuss two bills the House passed last Congress: the Federal Communications Commission Process Reform Act, and the Federal Communications Commission Consolidated Reporting Act.

The following statement is from USTelecom President & CEO Walter B. McCormick Jr.:

"We appreciate the continued efforts of Chairmen Upton and Walden to improve the FCC's transparency, efficiency, and accountability. The legislation being discussed at today's hearing will provide for streamlined regulatory processes and increased regulatory certainty, complementing reforms undertaken by President Obama and former Chairman Genachowski. We hope that today's hearing will lead to an even fuller examination in the months ahead of the need to update our nation's communications laws, and we look forward to working with the committee to achieve broad bipartisan consensus on further measures to address the emerging needs of our 21st century economy."

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About USTelecom
The United States Telecom Association, USTelecom, is the premier broadband trade association representing service providers and suppliers for the telecom industry. USTelecom represents companies offering a wide range of advanced telecommunications services including voice, video and data over local exchange, long distance, wireless, Internet and cable platforms.

FOR IMMEDIATE RELEASE
July 11, 2013

CONTACT
Dennis Wharton
202-429-5350
follow me

NAB Statement on FCC Process Reform

WASHINGTON, D.C. -- In response to today's hearing by the House Subcommittee on Communications and Technology on "Improving FCC Process," the following statement may be attributed to NAB President and CEO Gordon Smith:

"NAB continues to support efforts by Chairmen Upton and Walden to take a fresh look at FCC processes to ensure that Commission procedures don't impede the ability to serve the public interest. The agency has a critically important mission, and it is imperative that it execute that mission expeditiously, fairly and in a data-driven manner. We look forward to working with the Committee and the Commission to ensure that the FCC functions at the highest level for the American people."

About NAB
The National Association of Broadcasters is the premier advocacy association for America's broadcasters. NAB advances radio and television interests in legislative, regulatory and public affairs. Through advocacy, education and innovation, NAB enables broadcasters to best serve their communities, strengthen their businesses and seize new opportunities in the digital age. Learn more at www.nab.org.

For Immediate Release:
July 11, 2013

Contact: Rob Thormeyer
202-898-9382, rthormeyer@naruc.org

NARUC's Ramsay Applauds Effort to Reform FCC Process

WASHINGTON—Reforming how the Federal Communications Commission develops rules and implements policies will benefit consumers, the markets it oversees, and result in a better record for agency decisions, the National Association of Regulatory Utility Commissioners told Congress.

In testimony today before the House Energy and Commerce Committee Subcommittee on Communications and Technology, NARUC General Counsel James Bradford Ramsay applauded committee members for pursuing this issue through draft legislation.

"Let me begin by sincerely thanking you for circulating the discussion draft and holding this hearing," Mr. Ramsay said. "There is no question that reform is needed."

The discussion draft includes numerous improvements that will greatly improve agency decisions, transparency, and market oversight, Mr. Ramsay said. While careful to note that NARUC either does not endorse or have a position on every element in the bill, the product overall is a positive development, he added.

Specifically, NARUC supports the draft's changes on how the FCC proposes and seeks comments on new rulemakings. The draft requires the agency to ask public comments on the specific language of proposed rules and a minimum of 30 days for stakeholder comment, with another 30 days for replies.

"Though it will require the FCC to manage its proceedings more carefully, this is a crucial improvement over the current process," Mr. Ramsay said. This will particularly assist NARUC's State public utility commission members, who are often among the experts on these issues, in getting their comments in on time.

Mr. Ramsay also expressed NARUC's support for language that would direct the FCC to create a searchable online database of consumer complaints. Doing so would help consumers choose among competing providers and services. NARUC adopted a resolution calling for such a system in early 2012. "For competition to flourish consumers need access to information that will help them make informed decisions," Mr. Ramsay said. "A comprehensive, searchable database on consumer complaints will provide just that."

In addition, the draft legislation will greatly assist in making the several joint collaborative boards between State and federal commissions more effective and efficient. The FCC and NARUC members convene three congressionally mandated joint boards/conferences charged with making recommendations on universal service, advanced services, and separations. FCC commissioners participate during joint board meetings, but the agency's "Sunshine rules" prohibit more than one commissioner from participating at one time.

This means that during joint board hearings, FCC commissioners must rotate their participation, "causing continuous inefficient repetition of prior conversations and positions," Mr. Ramsay said.

Sunshine reform "is long overdue," he said. "This section unquestionably streamlines the FCC's decisional procedures. Its requirement for party diversity for a quorum to meet is a critical and clever additional protection of process."

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NARUC is a non-profit organization founded in 1889 whose members include the governmental agencies that are engaged in the regulation of utilities and carriers in the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands. NARUC's member agencies regulate telecommunications, energy, and water utilities. NARUC represents the interests of State public utility commissions before the three branches of the Federal government.

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NEWS

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445 12th Street, S.W.
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FOR IMMEDIATE RELEASE:
July 11, 2013

NEWS MEDIA CONTACT:
Matthew Berry, 202-418-2005
Email: Matthew.Berry@fcc.gov

STATEMENT OF COMMISSIONER AJIT PAI
ON CONGRESSIONAL HEARING ADDRESSING FCC PROCESS REFORM

I am pleased that today the House Energy and Commerce Committee's Subcommittee on Communications and Technology is examining ways to improve FCC processes. Process often dictates outcomes. Unfortunately, this means that FCC rules and policies can impede investment and innovation in the communications sector. Legislation reforming FCC processes is an important way to address this problem, and I look forward to working with Members of Congress on statutory solutions, including consolidating the many redundant reports that the Commission must produce each year. In the meantime, there is much that we at the Commission could do right now to improve and modernize our operations. For example, by creating more internal deadlines, adopting sunset clauses, weighing costs and benefits, streamlining our review of transactions, and enhancing transparency, the Commission could better serve the American people. I hope that today's hearing portends progress in updating FCC processes to reflect the realities of today's marketplace.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

October 4, 2013

Mr. Larry Downes
245 Willamette Avenue
Kensington, CA 94708

Dear Mr. Downes:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, July 11, 2013, to testify at the hearing entitled "Improving FCC Process."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Monday, October 21, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.Savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Responses to Questions for the Record of

Larry Downes

Internet Industry Analyst and Author

House Committee on Energy and Commerce
Subcommittee on Communications and Technology
"Improving FCC Process"
October 16, 2013

<u>The Honorable Henry Waxman</u>

Section 13(a)(1)(A) of the draft legislation effectively requires the FCC to issue a Notice of Inquiry (NOI) for every new rulemaking.

1. **Can you think of situations in which an NOI confers no benefit and unnecessarily leads to delay? For example, if the FCC is looking to update technical rules that would re-designate certain spectrum from voice to broadband services, would the requirement for the FCC to issue a NOI really contribute to the process?**

2. **What happens when the FCC has to address routine matters, such as fee proceedings, or refresh the record in an already open proceeding? Would an NOI still be necessary in such instances?**

My reading of Section 13(a)(1)(A) does not support the conclusion that it "effectively requires the FCC to issue a Notice of Inquiry (NOI) for every new rulemaking." The draft provision only requires an NOI, in fact, when all of several other conditions ***have not*** been met.

Under the draft provision, a notice of proposed rulemaking (NPRM) would not require an NOI in situations where the Commission can simply identify:

(1) A prior notice of proposed rulemaking issued during the previous 3 years of which the NPRM is a "logical outgrowth"

Or

(2) A prior notice on a petition for rulemaking issued during the previous 3 years of which the NPRM is a "logical outgrowth"

Or

(3) An order of a court reviewing action by the Commission or otherwise directing the Commission to act during the previous 3 years of which the NPRM is issued "in response"

Or

(4) A finding that the propose rule or amendment "will not impose additional burdens on industry or consumers"

Or

(5) "For good cause, that a notice of inquiry is impracticable, unnecessary, or contrary to the public interest."

Satisfying any one of these five broad alternatives excuses the Commission from the need to precede an NPRM with an NOI.

These exceptions strike a reasonable balance between the Commission's need for flexibility and the goal of improved agency efficiency with the equally important and essential goals of improving the transparency of Commission rulemakings and ensuring adequate opportunity for notice and comment before the agency signals its determination to act.

As noted in my written testimony, the FCC is unique among independent federal agencies in both the volume of its rulemakings and the lack of minimal analytic rigor that is too often associated with the agency's determination of (1) the need for regulation, (2) the scope of the regulation, or (3) the choices it makes among alternative regulatory solutions.

That failing is amplified by the sheer volume of FCC rulemakings. According to a recent longitudinal study from the Administrative Conference of the U.S., the FCC issued 421 final rules between 2007 and 2012--the most final rules of any independent federal agency. To put that number in perspective, the FCC issued nearly three times the number of final rules as did the Securities and Exchange Commission, which was second with 117 during the same period.[1]

Compounding the problem further, the FCC is the only major independent agency that is not required to include cost-benefit analysis in its rulemakings, and the only such agency that does not regularly do so even absent a statutory requirement.[2]

Until such time as the agency joins the rest of the federal government in conducting this most basic form of economic impact analysis for its proposed rules, it would seem particularly urgent

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[1] *See* Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies* (April 30, 2013), Table I at p. 10, *available at* http://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf.

[2] *Id.* at p. 55, Table 3 at p. 56, p. 63, Table 4 at p. 64, p. 102-105, 108-109, 119-120,

to ensure the FCC first collects essential information about the potential impact of a rulemaking on affected parties and consumers before actually proposing the new rules. The mechanism of an NOI that precedes an NPRM is an effective and efficient mechanism for doing so.

The FCC itself seems to appreciate the danger of proposing regulations absent the kind of economic record regularly compiled by other agencies before they take action. As the ACUS report notes:

> Another FCC official said the primary problem they have in doing analyses in certain areas (e.g., spectrum allocation) is that they are regulating in new space with new technology, there is "no record there," and therefore nobody knows how to quantify benefits or costs with any degree of precision. In such cases, he said, said [sic] they try to put a lower bound on benefits, and an upper bound on costs, to know whether the rule would produce positive net benefits.[3]

Without more details, it is not possible to address the specific hypotheticals posed in questions (1) and (2). However, in all three cases—the re-designation of spectrum, fee proceedings, and refreshing the record in an already open proceedings—at least one of the five alternative conditions listed above would seem likely be satisfied. If that is the case, then the FCC would not, under the proposed Section 13(a)(1)(A), be required to issue an NOI prior to proceeding with a rulemaking. In such cases, the FCC need simply identify which of the five exceptions it was invoking, and, where required, point to the appropriate source.

[3] *Id.* at 105.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

October 4, 2013

Mr. Richard J. Pierce, Jr.
Lyle T. Alverson Professor of Law
George Washington University of Law
2000 H Street, N.W.
Washington, D.C. 20052

Dear Mr. Pierce:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, July 11, 2013, to testify at the hearing entitled "Improving FCC Process."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Mr. Richard J. Pierce, Jr.
Lyle T. Alverson Professor of Law
George Washington University of Law
2000 H Street, N.W.
Washington, D.C. 20052

The Honorable Greg Walden

1. Mr. Pierce, in your response to a question regarding the appropriateness of FCC merger review, you responded that "it would make a lot of sense to take the FCC completely out of this. The FCC doesn't know much about antitrust law. The FTC and the Department of Justice know a lot about antitrust law. They have the power to impose conditions, they regularly impose conditions on mergers, those conditions are specifically tailored to address the competitive issues that are raised by a proposed merger."

As an expert in antitrust law, could you please elaborate on why you believe the FCC should be removed from the transaction review process?

DOJ and FTC have well-developed expertise in antitrust law. Both the DOJ Antitrust Division and the FTC Bureau of Competition are staffed by economically literate lawyers and economists who have an excellent understanding of the potential effects of mergers on competition. Both also have the power to attach conditions to mergers to insure that they do not have adverse effects on competition. FCC lacks the expertise and staff required to evaluate the effects of mergers. Giving FCC concurrent power to approve and/or to condition mergers is inefficient and duplicative.

The Honorable Henry Waxman

1. At the end of the hearing, Chairman Walden and Mr. McDowell seemed to suggest that the litigation risks presented by the FCC Process Reform Act which you highlighted in your testimony would be mitigated by Chevron deference. Is that your understanding?

Chevron holds that a court must uphold a reasonable agency interpretation of an ambiguous provision in an agency-administered statute. Chevron deference does not eliminate any the problems I identified in the Bill, though it gives FCC some degree of discretion in interpreting and applying the provisions in the Bill to the extent that the provisions are ambiguous.

FRED UPTON, MICHIGAN
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COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

October 4, 2013

Mr. Randolph J. May
President
The Free State Foundation
P.O. Box 60680
Potomac, MD 20859

Dear Mr. May:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, July 11, 2013, to testify at the hearing entitled "Improving FCC Process."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Answers of Randolph J. May to October 4, 2013 Letter from Chairman Greg Walden
House Subcommittee on Communications and Technology
Hearing on "Improving FCC Process"

The Honorable Henry Waxman

1. Section 13(a)(1)(A) of the draft legislation requires the FCC to issue a Notice of Inquiry (NOI) for every new rulemaking.

- Can you think of situations in which an NOI confers no benefits and unnecessarily leads to delay? For example, if the FCC is looking to update technical rules that would redesignate certain spectrum from voice to broadband services, would the requirement for the FCC to issue a NOI really contribute to the process?

Answer: I think there are some situations, perhaps most likely involving some very straightforward proposal to change a technical rule, where an NOI may be unlikely to confer a benefit. But I do not agree that the example given necessarily falls into that category, at least as I understand the question. This is because changing a certain spectrum designation from "voice," which may be offered over both narrowband and broadband wireless platforms, to broadband only may not be without complexities that would benefit from an NOI.

- What happens when the FCC has to address routine matters, or refresh the record in an already open proceeding? Would an NOI still be necessary in such instances?

Answer: Of course, there is often disagreement concerning whether a matter is or is not "routine." Nevertheless, there certainly are some matters that, by most accounts, might be considered routine, or where the FCC is simply refreshing a record in which comments already have been submitted. As I understand it, the discussion draft provides that, upon a showing of good cause, a notice of inquiry is not required if it is impractical, unnecessary, or contrary to the public interest." This provision would appear to provide a way for the FCC to avoid issuing an NOI for routine matters, or if it simply wishes to request parties to refresh a record.

2. You have previously stated in response to questions from the Committee that you have concerns about requiring the FCC to seek comment on a NOI/NPRM/petition for rulemaking on the same or substantially similar subject before issuing a NPRM because it has the potential to unduly delay the adoption of rules. Do you still hold the same criticism about the bill we are considering today?

Answer: I do still have some concerns that that an NOI requirement potentially may delay the adoption of some rules, although as I said in my response to the Committee in 2011, I also have a concern that, at present, too many of the FCC's

NPRM's are too unfocused. Too often, the NPRMs consist of far too many questions in an unending series without providing interested parties a meaningful sense of the real alternatives the agency is considering, and why it is doing so. If the Commission were to change the way it presently drafts many NPRMs, so that they were more focused on realistic alternatives the agency is considering, then the need for NOIs would be mitigated. In any event, the provision in the discussion draft appears to allow the Commission to avoid the NOI requirement upon a showing of good cause if an NOI is impractical, unnecessary, or contrary to the public interest. This provides the agency with some leeway if those standards are met. Finally, I wish to reiterate that in many instances, especially regarding non-routine matters, issuing an NOI before an NPRM can provide the agency with valuable information that will enable it to formulate a much better NPRM that will ultimately lead to a sounder rule.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

October 4, 2013

Mr. James Bradford Ramsay
General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, N.W., Suite 200
Washington, D.C. 20005

Dear Mr. Ramsay:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, July 11, 2013, to testify at the hearing entitled "Improving FCC Process."

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Sincerely,

Greg Walden

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

N A R U C
National Association of Regulatory Utility Commissioners

October 17, 2013

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
U.S. House of Representatives
Washington, DC 20515

The Honorable Henry Waxman
Ranking Member
Subcommittee on Communications and Technology
U.S. House of Representatives
Washington, DC 20515

Re: Response to additional questions for the record from July 11 hearing on "Improving FCC Process"

Dear Chairman Walden and Ranking Member Waxman:

Thank you for allowing NARUC to provide the Subcommittee with additional information regarding FCC reform. I have answered your questions below.

1. *Can you think of situations in which an NOI confers no benefit and unnecessarily leads to delay? For example, if the FCC is looking to update technical rules that would redesignate certain spectrum for voice to broadband services, would the requirement for the FCC to issue a NOI really contribute to the process?*

Answer:

Yes, there are situations where requiring a Notice of Inquiry (NOI) would not provide necessary benefits but could delay a needed FCC decision. Almost all, if not all, are covered by the emergency and interpretive exceptions built into the federal Administrative Procedure Act and incorporated by reference in the original draft legislation. Other clarifications of existing technical rules can also be addressed under that exemption without the need of a separate NOI. Other than that, it is difficult to come up with a scenario that would not benefit from a prior NOI.

Presumably, the quarterly updating of the Universal Service Fund surcharge – since it is calculated pursuant to final FCC rules – would not be subject to the requirement for a NOI under the draft legislation. Similar types of changes should not be subject to the NOI requirement, e.g., the implementation of costs or charges that are calculated based on existing FCC final rules. If my assessment of the legislation is incorrect and such items are <u>not</u> deemed exempt, it might make sense to add a very narrowly tailored list of exemptions to the requirement for a NOI. The exemption would need to be very narrowly drafted and avoid generic language or open-ended references to prevent the exemption from becoming an ambiguous statutory provision the agency could misuse to bypass the NOI requirement.

As noted in NARUC's testimony, the FCC has a habit of using Notices of Proposed Rulemakings (NPRMs) more as NOIs. Instead of actually proposing actual rules many NPRMs actually ask broad policy questions ideally asked via an NOI. NARUC supported Section 13(a) (1) (B) of the bill as

early as 2008. That section requires the FCC include the specific language of the proposed rule or modification in the NPRM – a difficult task for the agency if it is really a mislabeled NOI asking broad questions that was released as an NPRM. Few complain that the FCC ever issues decisions too quickly. Some do complain that it lets issues languish for extended periods of time. So long that, in some cases, the agency has to seek to refresh the record before acting or dismiss the underlying petition as stale. Sections – (f), (g) (h) and (i) of the draft are laudable procedural vehicles to (1) assure that orders do not languish at the agency and (2) allow all Stakeholders to know when matters in which they have an interest are likely to come up for decision. NARUC has said, "The FCC should set deadlines on each type of filing where no statutory deadline exists - including complaints - but particularly rehearing requests and remands which have a tendency to languish at the FCC." These other provisions of the draft legislation effectively suggesting deadlines for FCC action on both NOIs and NPRMs are likely to shorten the rulemaking process at the FCC, not lengthen it.

2. *What happens when the FCC has to address routine matters, such as fee proceedings, or refresh the record in an already open proceeding" Would an NOI still be necessary in such instances?*

Answer: As noted in the answer to the first question, I do not believe that fees calculated pursuant to established FCC rules would be subject to the NOI requirement. Fee proceedings are very specific questions and do not address broad policy issues. In the case where the FCC has already completed an NOI at the time the law becomes effective, and needs to refresh the record before proceeding, I do not read the draft legislation to require another NOI. As long as the FCC is required to issue the actual text of any proposed rules in the subsequent NPRM, no small business, entrepreneur or smaller State or local government would be disadvantaged.

If you have questions about NARUC's positions or would like to discuss it further, please contact NARUC General Counsel Brad Ramsay at (202)898-2207, jramsay@naruc.org, or Legislative Director Brian O'Hara at (202)898-2205, bohara@naruc.org.

Sincerely,
/s/ James Bradford Ramsay

James Bradford Ramsay
NARUC General Counsel

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

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COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225-2927
Minority (202) 225-3641

October 4, 2013

Mr. Stuart M. Benjamin
Douglas B. Maggs Chair in Law and Associate Dean for Research
Duke Law School
210 Science Drive
Box 90360
Durham, NC 27708-0360

Dear Mr. Benjamin:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, July 11, 2013, to testify at the hearing entitled "Improving FCC Process."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

ANSWERS TO QUESTIONS FOR THE RECORD BY

STUART MINOR BENJAMIN
DOUGLAS M. MAGGS PROFESSOR OF LAW
DUKE LAW SCHOOL

Before the
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
of the
UNITED STATES HOUSE OF REPRESENTATIVES

on the
FEDERAL COMMUNICATIONS COMMISSION PROCESS REFORM ACT OF 2013
November 1, 2013

Answers to Questions from the Honorable Henry Waxman

1) Can you think of situations in which an NOI confers no benefit and unnecessarily leads to delay? For example, if the FCC is looking to update technical rules that would re-designate certain spectrum from voice to broadband services, would the requirement for the FCC to issue an NOI really contribute to the process?

I can think of many situations in which a notice of inquiry (NOI) confers no benefit and unnecessarily leads to delay. Let me begin by emphasizing that the term "notice of inquiry" appears nowhere in the Administrative Procedure Act (APA), and only once in the United States Code. NOIs make sense when an agency does not have sufficient information to propose a regulation. For instance, on broad questions like the circumstances under which licensed uses might be more attractive than unlicensed and vice-versa, the Commission may want to formally seek information through an NOI (rather than rely on its usual information-gathering processes) because it wants to cast its net particularly widely and to encourage commenters to think broadly about telecommunications policy before the Commission puts forward a concrete proposal. Or there may be so much uncertainty about the different ways private companies might want to implement a new technology that the FCC wants to gather information about plans to implement that technology before proposing regulations of its use. But there will be many situations in which an agency has already gathered sufficient information that it can follow the APA's process and issue a notice of proposed rulemaking (NPRM) without first issuing an NOI. After all, agencies gather lots of information from private companies, interested parties, their own staff, etc., and frequently that information will be more than sufficient for the agency to issue an NPRM. In such circumstances, an NOI would confer little or no benefit and would unnecessarily delay the rulemaking process. The example you give of technical rules that would

re-designate spectrum from voice to broadband services is just one of many. When the Commission is considering, for example, power limits for a particular service in a specified band, its staff can gather the relevant information by performing tests and having discussions with the entities that plan to offer the service. An NOI would add nothing, and would greatly slow down the process.

2) What happens when the FCC has to address routine matters, such as fee proceedings, or refresh the record in an already open proceeding? Would an NOI still be necessary in such instances?

I cannot fathom why NOIs would make sense for such routine matters. Refreshing the record with an NOI in an already open proceeding for a routine matter seems particularly wasteful. If the most recent version of the pending legislation has such a requirement, it would impose costs with no meaningful corresponding benefit.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

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Minority (202) 225–3641

October 4, 2013

The Honorable Robert M. McDowell
Visiting Fellow, Hudson Institute
1015 15th Street, N.W., 6th Floor
Washington, D.C. 20005

Dear Commissioner McDowell:

Thank you for appearing before the Subcommittee on Communications and Technology on Thursday, July 11, 2013, to testify at the hearing entitled "Improving FCC Process."

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Sincerely,

Greg Walden

Greg Walden
Chairman
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cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

HUDSON
INSTITUTE

October 21, 2013

The Honorable Greg Walden
Chairman
House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Chairman Walden:

Thank you for the opportunity to testify before the Subcommittee on Communications and Technology on Thursday, July 11, 2013, at the hearing entitled "Improving FCC Process."

Attached please find my responses to the questions for the record from Ranking Member Waxman.

Please let me know if I can be of further assistance or answer any additional questions. I can be reached via email at usa.mcdowell@gmail.com and on my cell phone at (202) 251-4640.

Sincerely,

/s/

Robert M. McDowell
Visiting Fellow
Hudson Institute
Center for Economics of the Internet

1015 15th Street, N.W. Sixth Floor Washington, D.C. 20005
202.974.2400 Main 202.974.2410 Fax
www.hudson.org

Answers From

The Honorable Robert M. McDowell
Visiting Fellow
Hudson Institute
Center for Economics of the Internet

October 21, 2013

The Honorable Henry Waxman

1. Section 13(a)(1)(A) of the draft legislation effectively requires the FCC to issue a Notice of Inquiry (NOI) for every new rulemaking.

- Can you think of situations in which an NOI confers no benefit and unnecessarily leads to delay? For example, if the FCC is looking to update technical rules that would re-designate certain spectrum from voice to broadband services, would the requirement for the FCC to issue a NOI really contribute to the process?

- What happens when the FCC has to address routine matters, such as fee proceedings, or refresh the record in an already open proceeding? Would an NOI still be necessary in such instances?

A notice of inquiry (NOI) is a sensible way to begin to explore an issue of interest. Should the FCC initiate *every* proceeding with an NOI? Not necessarily. In those instances where the FCC initiates a notice of proposed rulemaking (NPRM) without first completing an NOI, the NPRM ought to include an explanation as to why the proceeding is beginning without an NOI. The draft bill contemplates providing such flexibility. That said, it is important to note that the Commission has a long bipartisan history of issuing NPRMs that contained no proposed rules. On their face, these documents were nothing more than NOIs, yet they acted as precursors to the promulgation of new rules without adequate opportunity for public comment on the proposed text of those rules. Language in the draft legislation tries to restore proper administrative procedure, allow for flexibility of action and encourage disclosure of the Commission's substantive and procedural rationales where appropriate.

With respect to the questions here, as has always been the case, the FCC is free to take additional regulatory action, including issuing an NPRM, at any time (including immediately) after the close of the comment cycle period associated with an NOI. The hypotheticals described here do not appear to change this fact. Thus, a preliminary inquiry about possible future rule or policy changes would not cause undue delay and would offer a real potential benefit to the decision-making process.

Regarding routine matters or a desire to refresh the record in an already open proceeding, the FCC staff regularly rely upon delegated authority to issue public notices. Therefore, an additional NOI would not be necessary in these circumstances.

2. Mr. McDowell, while serving as an FCC Commissioner, you eloquently explained why not printing a draft rule in an NPRM made sense in some instances. In the Text-to-911 NPRM, you expressed support for the "prudent decision" to refrain from including draft rules in the NPRM at issue and you noted it made sense for the FCC to refrain from including draft rules because "putting forth proposed rules at this delicate stage may only distort the private sector's creative process," and the open-ended nature of an NPRM allows the Commission to "elicit greater insight regarding the costs and technical feasibility of potential implementation." I think your previous statement was an appropriate call for agency flexibility. Have you changed your mind? Do you now support a blanket requirement requiring the FCC to include the specific language of a proposed rule in every NPRM?

I have always maintained that the ability to be flexible is important. The Text-to-911 NPRM is a terrific illustration of an unusual circumstance where such flexibility was warranted. In the rare event that the Commission releases an NPRM without including draft rules, the NPRM ought to include a thorough explanation as to why the document does not contain draft rules. In other words, the Commission ought to omit draft rules only after careful consideration and in limited circumstances. Ideally, in these circumstances, a further notice of proposed rulemaking would be released at a later time, which would include a set of draft rules. This way, the public would have the opportunity to inform policymakers on the advantages and disadvantages associated with the draft rules. Likewise, policymakers would benefit from receiving additional, more targeted, comment. The draft bill's language contemplates such flexibility.

3. Do you support the provision in the bill requiring the FCC to make proposed final rules public before Commissioners have a chance to vote on adoption? How do you think this provision would square with FCC rules regarding unauthorized disclosure of any FCC nonpublic information, such as the contents of agenda items?

Transparency in government should always be a high priority. Additionally, providing the public with a meaningful opportunity for substantive comment on material proposals would better inform the FCC's judgment. As noted above, release of draft rules confer mutual benefits for the public and policymakers. In the unlikely event that policymakers find themselves heading far afield from rules originally proposed and released, I hope they would want to seek further notice and comment on a second set of proposed rules. Should Congress elect to require the FCC to release proposed final rules to the public prior to formal adoption, I would respectfully suggest that Congress consider modifying the Communications Act to permit FCC personnel to release nonpublic information in a prudent and flexible manner without penalty.

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